

CONSUMER
REPRESENTATION IN
THE NEW DEAL

BY

PERSIA CAMPBELL, A. M.

DEPARTMENT OF ECONOMICS
QUEENS COLLEGE, NEW YORK CITY

SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS
FOR THE DEGREE OF DOCTOR OF PHILOSOPHY

IN THE
FACULTY OF POLITICAL SCIENCE
COLUMBIA UNIVERSITY

NEW YORK

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*To the next generation, and particularly to five of them,
in the hope they will enjoy the advantages
of a consumer-minded society*

"Consumption is the sole end and purpose of all production; and the interest of the producer ought to be attended to only so far as it may be necessary for promoting that of the consumer."

ADAM SMITH, *Wealth of Nations*, 1776.

FOREWORD

WE have no adequate ideology of the consumer movement in the United States. It, like our modern technology and our less modern business system, has sought to operate under a now primitive marketing ideology, assuming a moving balance of opposing forces, which made sense to the expanding world of the merchant and the small manufacturer. Within this market equilibrium, all forces, both great and small, were supposed to register themselves in humanly just proportion. Today, such a rationalization of the way things work fits neither the giant power of industrial technology operated under finance capitalism nor the dwarfed ultimate consumer at the other end of the economic funnel. The dominant thrust of the industrial capitalist is to avoid the statics of balance and to dominate and coerce the market to his ends; while the consumer, chivvied by the pressures of the market, has no interest whatsoever in conceiving of himself as part of a theoretical balance, but simply wants to spend his too little money in order to live better.

In the world of dynamic totalitarian controls in which we now live, all ideas of automatic balance among the socio-economic forces are permanently relegated to the museum of the past. We shall never again cross the range back into that deceptively green valley. From now on, anything good that happens to man will have to be the result not of automaticity but of his having planned to make it happen.

Only by embracing a pleasantly vicious fiction have we been able to pretend that the consumer, following the example of organized industry and labor, could organize his strength as an equal bargainer in the market. Under our type of socio-economic order, the scattered millions of consumers can not be expected to mass their wishes and throw their potential true weight into the assumed marketing balance. During the depression scattered groups of consumers have waged guerilla warfare against certain business practices. Business, used to

having things its own way, has not liked this; and, led by advertising interests and the business departments of national periodicals, has fought back with everything from blandishment and trickery to a modest recognition of "certain injustices practiced against the consumer in the past."

While one may recognize squarely the ultimate drastic limitations on the effort to organize consumers to play pressure politics in Washington, this does not mean that the consumers' case is hopeless. Quite the contrary. The logic of events has forced the issue out into the open: there is a "consumer problem" of national proportions, and it is here to stay as a large white elephant on the doorstep of business. The old indirection, "Take care of business and the consumer can take care of himself," has been shown to be shoddy under our present system of private competitive business. If the expanding economy of the nineteenth century could overlook Adam Smith's sensible statement which Dr. Campbell sets at the beginning of this book, it is going to be harder and harder to keep on neglecting it from now on. We have tried the path of indirection—and it does not work. The insistent question today is: What in the world is the economy of a democracy all about if it isn't about enlarging the capacity of the mass of its citizens to live? The National Resources Committee has just shown us that in 1935-36 a third of our American families and single individuals had gross incomes of less than \$780, and two thirds less than \$1450. Against that stark picture of non-abundance, the old formula for achieving consumer welfare by indirection makes too little sense to be trusted any longer.

Chronic problems may lie latent through decades of quiet times when an economy is expanding and "progress" is the slogan. "Work hard, be patient just a little longer, and your time will come next" has been the formula down through our national history; and it worked wonders—for the lucky few! But times of crisis show up the shoddy in the cloth. The depression that began in 1929 signalized the end of the era of expansion. Immediately, it meant reverses for business and

hunger for millions of our families. Less immediately, but no less surely, it brought the skeletons out of the closet: Opportunity for the man on the floor of the shop was seen to have been shrinking until his "turn" was unlikely ever to "come"; we free Americans had created behind the facade of Wall Street and the magnificent technological efficiency of the assembly line a permanent American proletariat; and, beneath the level of those able to find work on any terms, lay a permanent pool of several million hungry unemployed workers.

Crisis prompted action. And it is the record of a small but significant part of this emergency action that Dr. Campbell here so ably presents. The Consumers Advisory Board of N.R.A. was an afterthought—a gesture to the women of the country that was never intended by General Johnson to work. The ideology of the National Recovery Administration was still that of the balance in the market under which our American economy had waxed great. Under governmental supervision, business and labor were to plan certain changes in their operations which would insure fair trading, a better balance, and therefore welfare. And when a puny Consumers Advisory Board was set up, it, too, was supposed to be an agency in the trading balance.

But the sickness in the economy and its supporting social structure went deeper than a temporarily displaced balance in the market. Dr. Campbell recounts the fumbling of the badly understaffed Consumers Advisory Board, confronted by the choleric General Johnson and the massed opposition of the industrial forces who were running wild, making a field day of N.R.A. for business. And when N.R.A. collusion failed to "end the depression" and the Blue Eagle's feathers began to moult, Dr. Campbell shows how men like Keezer and Hamilton kept pushing consistently for a type of "consumer interest" that kept the "public interest" central. It was no secret around Washington as the N.R.A. episode wore on that the consumer representatives in Washington embodied this "public interest" in their proposals day in and day out far more nearly than did either of the far bigger and better supported advisory boards representing industry and labor.

On this issue of the public interest the consumer's case rests. And the events Dr. Campbell presents constitute an important milestone in the clarification of the issue. "Good business" had failed to care, save incidentally, for the welfare of all of the people in their vital consumer role; and business, gone berserk under the freedom given it by N.R.A., re-demonstrated even in the face of widespread national misery its inability to work for anybody but itself. By so doing, it raised in the minds of millions of Americans the question: "Whose business is business in a democracy?"

As this book goes to press, domestic issues are overwhelmed by the world crisis. The forces fostered by capitalist imperialism have broken their dikes, and the effort to compete the world to welfare has landed it in the most desperate chaos of modern times. As a result, we and our children may live from now on in a world preoccupied with permanent economic and military warfare. In such a *sauve qui peut* world, dominated by rival imperialisms abroad and state capitalisms at home, the pressure will be great, and in the end irresistible, for us to pay our way at the expense of the standard of living of our people. War—economic or military—is the most wasteful great institution ever developed by man. If, having played a part in the creation of this Frankenstein, we must now engage to live with it and do its will, one thing is certain: the American people can spare no penny of their reduced resources to finance the chronic lags, leaks and frictions of the old type of business enterprise. Every dollar of income cut down to less than that amount of real buying power by the wasteful tactics of financing, manufacturing and distribution is so much badly needed living thrown down the sewer. The aim of human beings is to live and to grow. If we are helpless now to prevent the squandering of a vital share of our resources on armament and international economic warfare, we must see to it that the margin that remains is not depleted by the wasteful processing taxes of competitive enterprise. "Business as usual" has now become an intolerably wasteful luxury for a democracy.

The way ahead is dark and confused. Nobody has the solution. But the present crisis is but the chronic crisis of business warfare writ in gigantic letters across the world. If the Consumers Advisory Board faced in little the essential issues involved in trying to reinsert the people's interest into business warfare, the record of that brief battle under N.R.A. should illumine our thinking and action as we Americans face the same issues now on a world-wide scale. For the only way that democracy can survive, if indeed it is not now too late for it to survive at all, is through the quality of living it can help the rank and file of its citizens to achieve.

ROBERT S. LYND

COLUMBIA UNIVERSITY,
JULY, 1940.

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INTRODUCTION

"I believe we are at the threshold of a fundamental change in our popular economic thought, that in the future we are going to think less about the producer and more about the consumer."—Governor Franklin D. Roosevelt, Address at Oglethorpe University, May, 1932.

"We would save and encourage the slowly growing impulse among consumers to enter the industrial market place equipped with sufficient organization to insist upon fair prices and honest sales."—President Franklin D. Roosevelt, Message to Congress, January, 1934.

THE theory of a competitive system in industry was developed by Adam Smith and his followers with reference to the contemporary struggle of private enterprise to escape the rigid controls of British mercantile policy. They advocated a governmental policy of laissez-faire in order to give full play to competitive forces. It was assumed that an era of free private enterprise would be characterized by large numbers of more or less equal units of production striving with each other to satisfy consumer wants and reaping the reward of a reasonable profit by efficient service. National well-being, or wealth, was thought of in terms of consumer welfare.

The ideal of a free competitive system, as envisioned by the traditional theorists, has, for a century, dominated American public policy towards industry. There have indeed always been exceptions as, for instance, in our policy towards the utilities, but generally speaking we have aimed to maintain free competition in industry as an essential condition for a free democracy. During the popular agitation in the eighties against the development of great corporate trusts, the slogan was that the Union could not continue half democratic and half plutocratic. Henry Demarest Lloyd¹ and other public men of the time urged public ownership or control of corporate industry, as the only realistic policy in view of the trend towards monopoly. But this solution was rejected in favor of that embodied in the Sherman anti-trust legislation of 1890, namely

¹ See his *Wealth versus Commonwealth*, 1894.

that a free competitive system could be substantially maintained by positive action on the part of the state, prohibiting combination in restraint of trade. It was assumed "that an individualism not sufficiently rugged to maintain itself, could be compelled by law to survive."² The governmental role of laissez-faire towards industry was thus abandoned but only in order to preserve the competitive system itself.

The public determination to maintain competition was weakened as the Populist movement of the nineties spent itself and the years brought better times. The Sherman act as an instrumentality of competition was whittled down by court decisions and inept administration. Big business thrived. But the national nostalgia for the days of small things periodically found expression in new legislation directed towards promoting the traditional ideal.

In 1912, President Wilson became the champion of this ideal and took up the struggle to restore an economy of small competing enterprises, with opportunity for the "man on the make" to enter the business field and bargain for the consumer's favor. Through the years there had indeed been some change in public attitude towards competition, and a tendency to think of it more exclusively in terms of competitive practices between business men and whether such practices were "fair" or "unfair", rather than in terms of the purpose of the competitive process, namely the satisfaction of consumer wants. The competitive process seemed good in itself, offering a desirable way of life to the man seeking opportunity, so that we tended to pay more attention to the means than to the ends, as is clear from the history of the Federal Trade Commission which was set up to find and fix proper limits to competitive pressures in order to prevent monopolistic practices. But underlying this changing public attitude was still the fear of economic monopoly as a threat to the good life, to general social well-being, and there was a continued ebb and flow of determination to destroy it.

2 A. R. Burns, *The Decline of Competition*, 1936, p. 462.

The brief N.R.A. experiment was not, as is sometimes assumed, out of line with this traditional policy. This is clear from debates in Congress leading up to and during the life of N.R.A.³ Its basic intent, as a public policy, was to build into a code of industrial law the developing standards of "fair" competitive practices as a bulwark to the competitive system. It soon became apparent however that organized pressures from business and labor were converting N.R.A. into a device to strengthen an industrial structure essentially non-competitive in character. The conflict between public policy and private interest became clearer as the N.R.A. experiment proceeded and was in no way resolved by its sudden termination.

Our public policy towards industry is now in a state of great confusion. We have the spectacle of one interest group after another turning to the government to support by public sanctions various attempts to protect particular trading positions against competitive pressures, and we no longer have a clear basic policy against which to evaluate these programs.

For the fact is we have failed to achieve our traditional aim. We have not succeeded in establishing an economy of the Adam Smith model. On the contrary, the trend towards large corporate enterprise has continued until it is now the dominant characteristic of our industrial structure,⁴ and, though bigness is not necessarily monopolistic, elements of monopolistic advantage are inherent in it. Even in sections of industry not dominated by large business, controls of various sorts, price-leadership, formal and informal understandings, are building an industrial structure quasi-monopolistic in character. Similar tendencies are now operating even in the field of distribution. The vigor of these forces making for the limitation of competition became apparent during N.R.A. days. To the more familiar concepts of "fair" and "unfair" competition, we have now added that of "imperfect" competition.

³ See particularly speeches by Senators Nye and Borah, January 18, 1934.

⁴ See A. A. Berle, Jr. and G. C. Means, *The Modern Corporation and Private Property*, 1933.

But more significant than the change in our industrial structure out of line with our historic ideal, is the change in the nature and strength of its motivating force. According to traditional theory the basic regulating force of the competitive system was consumer demand. The consumer was thus given the major role in the productive process. Business men would compete with each other to reduce cost and improve quality in order to establish a bargaining advantage at the market. As demand for a particular product dropped off, competition would lead to a fall in price and this in turn would result in the elimination of the less efficient units in production until a new equilibrium was established between supply and demand. In this way loss to the individual business took on the aspect of a public gain. When demand increased prices would rise and new men would be induced to compete, so that established business would not be able to reap monopoly profits, the assumption being that industrial units would continue on a scale small enough to make it easy for new men to obtain the necessary capital to enter production in response to rising prices.

This theory of the motivating force of consumer demand assumed both that the competitive system would be highly responsive in all its parts to changes in demand and also that consumer choice would be intelligent to the extent at least that the consumer would select the good-quality, low-price product. In this way competitive advantage would lie with the honest efficient business, geared to consumer service. This explains the beneficent character which the competitive system took on in the eyes of the theorists.

With our existing economy, however, the impulses transmitted by changing consumer demand meet with resistances, obstructions, rigidities of one kind and another so that such demand no longer serves as a more or less automatic regulator of the productive process, even though, in the long run, it is still the determining influence. In their illuminating little book, *The Modern Economy in Action*,⁵ Drs. C. Ware and G. Means

contrast the response made by present-day industry to changing demand with the response expected by the theorists from the competitive system. They give illustrations showing where decreased demand for the products of corporate enterprise has led not to a fall in price and reduced production by the elimination of inefficient units in business, but to reduced production by efficient and inefficient alike with price levels relatively unchanged. As a result of unequal resistance set up in different parts of the industrial system (including resistance by organized labor) there are further maladjustments and disequilibriums which divert and impede the regulating influence of consumer demand.

Moreover it is a mistake to assume that under present conditions consumers always know what they want, are able to judge between good and bad products and are in a position freely to take or reject the products offered. Intelligent consumer choice has been made very difficult by the extraordinary variety of products at low cost which modern technology has put on the market. "The problem of choosing", it has been pointed out, "is a very recent one for the mass of people."⁶ It is important in this connection to emphasize the fact that a large part of our national income is spent across counters by the housewives of the nation, most of whom have very little money in their pocket-books⁷ and very little training in how to spend it wisely. They have little help in determining the quality and usefulness of many products other than the costly trial and error method, and this is particularly true of synthetic products and products that are packaged and canned. The May, 1934 volume of the *Annals of the American Academy of Political and Social Science* is entitled "The Ultimate Consumer—a study in economic illiteracy." This ignorance of quality can

⁶ R. G. Tugwell, T. Munro and R. E. Stryker, *American Economic Life*, 1925, p. 449.

⁷ In 1935-36 two-thirds of the consumer units of the country—including families and single individuals—were estimated to have an annual income of less than \$1450. See *Consumer Incomes in the United States* by the National Resources Committee, August, 1938.

be and on occasion is exploited so that the consumer can no longer rely on a proper relationship between quality and price. And, as Professor J. M. Clark has pointed out,⁸ "where the buyer cannot judge independently of what he is getting, the result is a serious weakening of the principal disciplinary force which keeps competition focused upon good quality and low prices."

In this confusing situation the consumer has been hindered rather than helped by advertising practices, since on the whole the advertising business has failed to take advantage of its constructive opportunities. Consumer demand has in fact frequently become the plaything of advertising technique in the hands of producing interests. "Presumably" says Professor Clark⁹ "the successful competitor is giving people what they want, or at least making them think he is giving them what he has made them think they want." Under such circumstances, the long-run determining influence of "consumer demand" on the productive process, is not in itself a guarantee that the consumer interest is adequately protected.

Consumers have secured some governmental protection against their own ignorance. Pure food and drug legislation is a fair guarantee against serious injury to health. Exploitive advertising has been brought under the scrutiny of the Federal Trade Commission. But they have not succeeded to any significant degree in securing information necessary to enable them adequately to judge the quality of the goods they buy. The federal government has been asked to set up in the administration a consumer service agency which would include among its functions the promotion of standards of quality for consumer goods. A similar service for industrial goods has long been provided for business men. But the consumer agency has not been established mainly because consumers are not organized to form an effective pressure group.

8 J. M. Clark, *Social Control of Business*, 1939 edition, p. 138.

9 *Ibid.*, p. 127.

This weakness in consumer organization is a fact of basic importance in our present economy, since it is leading to a progressive loss of consumer bargaining power at the market. Business and Labor are becoming well-organized in most industries and the principle of collective bargaining, essentially non-competitive in character, has been established in the productive process. But it has not been established as between producers and consumers, except on a small scale by the cooperatives, so that the consumer interest is likely to be further subordinated to that of the producer. We have become producer rather than consumer conscious. We seem in danger even of forgetting that the end of the productive process is the satisfaction of consumer wants. We talk of profit as the motivating force of industry, rather than of consumer demand with profit as a recompense for service. In no aspect indeed does our economy differ more from the ideal of the competitive system than in its conscious purpose. Now that we are confronted by the necessity of reshaping our traditional policy to meet the realities of the times, it is well to recall that theoretically the aim of the competitive system was to maximize the production and distribution of useful goods.

But how can this consumer point of view be brought to bear effectively in the reshaping of our public policy towards industry? The main difficulty is not so much in indicating the desirability of granting the consumer interest representation at the council tables where public policy is shaped, but, as Professor Herring has pointed out,¹⁰ in getting the concept translated into practice. Should the government, as has been suggested,¹¹ accept the responsibility of securing representation of the consumer interest since, though politically weak, it is of great social significance?

In the early N.R.A. and A.A.A. experiments the New Deal Administration took the initiative in providing administrative

10 E. Pendleton Herring, *Public Administration and the Public Interest*, 1936, p. 246.

11 See *e. g.*, A. R. Burns, *The Decline of Competition*, 1936, p. 581.

machinery for consumer representation in the governmental process. There were at the time a few federal agencies giving some service to consumers through the regulatory process (as, *e.g.*, in the Food and Drug Administration) or through research and information (as *e.g.*, in the Bureau of Home Economics), but they did not except incidentally exercise a representative function. The first practical proposal for consumer representation in the federal government seems to have been embodied in the amendment proposed by Senator George to the tariff bill of 1929 (H. R. No. 2667) providing for a Consumers Counsel to the Tariff Commission. The idea was suggested to him by the appointment in some states and the District of Columbia of a People's Counsel to the Utilities Commissions to represent the more or less unorganized interests of consumers in commission proceedings.¹² The amendment was adopted by the Senate after a five-hour debate, but rejected in Conference of the two Houses. It reappeared, with some minor amendments, as a provision of the tariff bill of 1932 (H. R. 6662) which passed Congress but was vetoed, for other reasons, by President Hoover.

It is rather surprising that the proposal for a Consumers Counsel to the Tariff Commission was not brought up again under the Roosevelt Administration, since it seemed to be regarded in 1932 as an integral part of the Democratic tariff program. However the importance of the consumer viewpoint was recognized by President Roosevelt (as evidenced, for instance, by his pre-election speech at Oglethorpe University in May 1932), and also by some of his aides, particularly in the Department of Agriculture. Promotion of the consumer interest also fitted in with the logic of the New Deal recovery program which was designed basically to bring about greater mass purchasing power by increasing payrolls and farm incomes without a corresponding rise in retail prices. It was generally assumed at first that the main job of the Consumers

¹²Corres., February 22, 1937.

Advisory Board, N.R.A. and the Consumers Counsel, A.A.A., would be "anti-profiteering", though before long they were found to be playing or trying to play a larger role.

In the following pages an attempt is made to study the organization and operation of these agencies and of the later Consumers Counsel of the National Bituminous Coal Commission, and to analyze the consumer policy developed by them with reference to programs for the regulation of industry and agriculture. "It may well be the key", wrote Dr. Gardiner Means of these agencies in 1934, "that will open the way to a truly American solution of the problem which is leading other countries in the direction of either fascism or communism."¹³

¹³ *Annals* of the American Academy of Political and Social Science, May, 1934, p. 7.

CHAPTER I

CONSUMER REPRESENTATION IN INDUSTRIAL REGULATION

THE CONSUMERS ADVISORY BOARD, N.R.A.

THE National Industrial Recovery Act became law on June 16, 1933, at a time of extreme industrial depression. By this Act, extraordinary powers were delegated to the President to provide for the formulation of codes of "fair competition" for American industry, through which it was hoped, by the Administration at any rate, "to restore our rich domestic market by raising its vast consuming capacity."¹ This was to be done both by increasing the wages of those employed and, particularly, by getting the unemployed back to work. "The law I have just signed," said President Roosevelt on signing the Act, "was passed to put people back to work—to let them buy more of the products of farms and factories and start our business at a living rate again." But he warned business: "If we now inflate prices as fast and as far as we increase wages, the whole project will be set at naught."²

In the administration of the Act, limits were to be set to unchecked competition, but the anti-trust laws were still to be effective against "monopolies that restrain trade and price fixing that allows inordinate profits or unfairly high prices."³ The plan was that each industry should submit to the National Recovery Administration a code of "fair competition," which after it had run the gamut of public hearing and examination in the public interest, would be submitted to the President for his approval, which thereupon gave it the status of law. On signing the Act, President Roosevelt announced that its Ad-

¹ See N.R.A. Bulletin No. 1, June 16, 1933 "Statement of the President"; this can be read conveniently in Hugh S. Johnson, *The Blue Eagle from Egg to Earth*, 1935, pp. 439-442.

² *Ibid.*

³ *Ibid.*

ministrator would have the advice of three official advisory boards—an industrial advisory board, a labor advisory board, and a consumers advisory board—to represent the interests of industry, labor, and the consuming public in the code-making process.

The Industrial Advisory Board and the Labor Advisory Board were first set up, the chairman for each being nominated by the Secretary of Commerce and the Secretary of Labor, respectively. There was no Secretary for the Consumer, and some delay ensued in setting up the Consumers Advisory Board, but on June 26, the Special Industrial Recovery Board, an interdepartmental committee, approved the appointment of a number of members to the Consumers Advisory Board under the chairmanship of Mrs. Mary Rumsey.

Members of the three boards participated in the public hearings on the code of "fair competition" for the cotton textile industry, the first code approved under N.R.A. When President Roosevelt signed the Executive Order approving this code, which became law on July 17, he had before him official statements of approval from the three boards. In the light of subsequent developments, there is an historic interest in the lyric quality of the editorial comments of the *New Republic* on the textile hearings, July 12, 1933:⁴ "The hearings on the textile code in Washington constituted an historic occasion . . . here for the first time a whole industry was assembled in public, with representatives of all interested groups, under sanction of the law, to legislate in the general interest. A code was submitted by the two great associations of employers. It was heard by an administrator and his experts, by representatives of labor, consumer and industry in general." The N.R.A. experiment was under way.

For two years the C.A.B. functioned as part of the National Recovery Administration. It was an advisory board only. On signing the National Industrial Recovery Act, President Roosevelt had said that the C.A.B. would "be responsible that the

⁴ P. 221.

interests of the consuming public will be represented.”⁵ On taking up its task, the Board was enjoined by the Administrator, to “watch every agreement and every hearing to see that nothing is done to impair the interest of those whose daily living may be affected by these agreements.”⁶ There were no other terms of reference, nor definition of its general function. As its chairman pointed out before the Senate Finance Committee, April, 1935,⁷ the Board had largely to interpret its own task. No less important, there was no previously formulated point of view as to what was the consumer interest in relation to various proposals for industrial regulation. As a result, the Board had to formulate or improvise a consumer point of view with reference to the multitudinous provisions of industry codes which in the early days were brought up to the N.R.A. for consideration at the rate of 70 or 80 a week.⁸ Further, after being approved, the codes had to be administered and, in the process, interpreted and amended; and in all these processes the C.A.B. claimed an interest on behalf of the consumer. Everything the N.R.A. had a right to do, the C.A.B. claimed a right to advise on, though that claim was not always, or at any rate not consistently, recognized.

The nature of the advice offered by the C.A.B., that is, its policy in the consumer interest, was to a considerable extent influenced by the conditions under which it was presented, particularly by the administrative procedure worked out by the N.R.A. for the formulation and administration of the codes. To appreciate the scope and content of the consumer policy developed by the Board it is therefore necessary first of all to have a clear idea of the circumstances under which that policy was developed.

5 N.R.A. Bulletin No. 1, *op. cit.*

6 See N.R.A. release No. 11, June 25, 1933. See also Bulletin No. 2, Consumers Division, National Emergency Council, 1934, p. 1.

7 Hearings before the Committee on Finance, U. S. Senate, 74th Congress, 1st Session, Investigation of the N.R.A., p. 967.

8 Lyon, L. S. and others, *The National Recovery Administration*, 1935, p. 127.

EFFECT OF N.R.A. PROCEDURE ON C.A.B. POLICY

N.R.A. procedure was experimental and subject to frequent change. The code process itself consisted of the formulation of the codes and their subsequent administration. In the process of code writing, the initiative was taken by the individual industry concerned, or a dominant element of the industry, usually through a trade association or a specially constituted committee. A draft "code of fair competition" was prepared, including provisions for minimum wages and maximum hours for labor, as required by the Act, together with the provisions which those responsible for the draft considered necessary to rehabilitate the industry. These latter provisions were in fact directed less to the establishment of a condition of free competition, than to the control of competition and competitive pressures.⁹

The first administrative step in handling a draft code was a preliminary informal conference held under the chairmanship of an N.R.A. Deputy or Assistant Deputy Administrator. In the hurly-burly of the early N.R.A. days, the Consumers Advisory Board was not always notified of these informal conferences, or not in time to send an adviser to participate in them; but as the procedure became more routine they were usually represented, together with the other advisory boards, the Legal Division of the N.R.A., and the Division of Research and Planning. Opinions expressed informally at these conferences were considered by the deputy and the industry in amending the draft for the required public hearing, at which advisers from the three advisory boards usually submitted formal reports for the records. The rights of these advisers, and particularly of the consumer adviser, at these hearings depended very largely on the individual deputy. The right of the consumer adviser, for instance, to question witnesses was established only after a fight. Very few of the N.R.A. officials, in fact, could understand the role of a consumer representative

⁹ *Ibid.*, p. 94.

in the N.R.A. program, and, particularly during the early days, there was a general impatience with "consumer interruption" of code proceedings. In this the deputy administrators reflected the attitude of General Johnson himself who at this time frequently snapped out, "Who is the consumer? Show me a consumer."¹⁰

Following the public hearings there were further conferences to reconcile such conflicting points of view as the deputy considered important. As in the case of the pre-hearing conferences, the C.A.B. had at times to assert its right to be informed of these post-hearing conferences and to participate in them. This neglect was not always caused by active opposition, but sometimes by the extreme pressure under which everyone was working. It was in every respect an emergency situation, without precedent, and only slowly did the vast organization take on form and order.

In June, 1934, an Advisory Council was set up within the N.R.A. machinery to reconcile conflicts of opinion among representatives of the different advisory boards. General Johnson's original plan for the Council, as outlined in Office Order No. 89, of May 21, 1934, was to have representatives of the advisory boards thrash out their differences at the first stage of the advisory process and present a unanimous report to the deputy administrator in charge of the code within ten days. This was an attempt to speed up the code process. But the boards objected to this change in procedure, and the Council itself resisted all efforts to bring it into the advisory process except as a court of appeals, after the preliminary conferences and hearings were over. The Administrator gave tacit consent to this change in plan.

The Council as originally set up consisted of three representatives of each of the advisory boards, with an executive secretary provided by the N.R.A. administrative office. After the National Industrial Recovery Board succeeded General Johnson as Administrator of the N.R.A. in October, 1934, the

¹⁰ Interview with Robert D. Lynd.

membership of the Council was changed to include two representatives of each of the advisory boards, with one representative from the Legal and one from the Research and Planning Division of the N.R.A., and a representative of the Chairman of the N.I.R.B. Each representative had one vote.

It was some time before the procedure of the Council was routinized. At first matters were referred to it by the Administrative Officer, by the advisory boards, and by the divisional and deputy administrators, but were later all channeled through the Administrative Officer.

The Advisory Council worked through committees on which sat representatives of the different advisory groups. These committees were set up to examine and report on particular questions as they arose. There was a liberal use of alternates both on the Council and on the committees, which facilitated the effective presentation of a case. Everything had to be done at top speed, for it was a campaign "to save the country." Many decisions were handicapped by lack of basic information, though every effort was made to elicit all major points of view both from committee members and interested witnesses who were called and cross-examined. The committees frequently prepared majority and minority reports for the consideration of the Council, and these reports helped to sharpen and clarify the issues. An interesting feature of the Council recommendations was the care with which they were prepared; for all important arguments were presented, whether for or against a particular decision, followed by the Council's suggestions for a solution. The Council recommendations thus constitute an important contribution to the understanding of the complex problems involved in industrial regulation and control.

The Council itself exercised only an advisory function. Its decisions took the form of recommendations to the Administrator, and later to the N.I.R.B. Nevertheless, its recommendations, when unanimous, had considerable influence on N.I.R.B. policy, except when that policy was determined by special considerations. The Council therefore was strongly impelled to

arrive at unanimity among its members on particular issues. Since, on the whole, the consumer point of view had a better hearing before the Council than before the deputy administrators, the C.A.B. placed great importance on extending the Council's influence. This led the C.A.B. in some cases to modify its original policy in order to achieve unanimity. As time went on the Board endeavored to have all issues in which it had a special interest referred to the Council, and, in fact, the majority of cases that came before the Council were referred on the Board's initiative. The work of the Council thus came to absorb an increasing amount of the Board's energies.

Even after a code had been through the Council procedure, consumer advisers felt impelled to follow its course up to the time of final approval. There was need for incessant watchfulness. In one or two notorious cases last-minute changes were made in the draft, after it had been through the routine procedure, without the attention of the Administrative Officer or the representatives of the advisory boards being drawn to them. In a decision on the zinc code, January 17, 1935, the Advisory Council strongly condemned such procedure as negating the very purposes of the administrative routine to ensure proper attention to the claims of interested parties.¹¹

When a draft code was forwarded to the Administrator for final approval, it was supposed to have attached to it the final reports of the three advisory boards, and in most cases this was done, following a procedural decision of September 11, 1933; by that date, however, several important codes had already been formulated and approved. At times the necessity for speed was said to preclude conformity to these routine requirements.

After a code went into effect, it was frequently referred back to the deputy administrator in charge for further consideration on any one of a number of grounds. The provisions might require interpretation, unless the code authority set up to administer the code took this task upon itself. An individual

¹¹ See A. C. Decision No. 154, 1935, p. 199.

business or a section of the industry concerned might ask for exemption from certain provisions, or for a "stay" in those provisions for the industry as a whole. Questions of coverage and of jurisdiction between industries might lead to an extension of the code. The C.A.B. claimed a right to representation in all these post-code developments whenever in its opinion consumer interests were involved, though the right was not formally recognized in all cases.

In an elaborate discussion on advisory procedure in March, 1935,¹² the Advisory Council recommended that the advisory boards should have an opportunity to express themselves on all matters in which they had an interest and that the boards themselves should alone decide when a matter was genuinely of interest to them. In order to make such decisions, the Council pointed out, the Boards must at least be informed of pending actions. The Council did not argue that the deputies should be prohibited from taking any action on any matter until the advisory boards had submitted opinions, because the need at times for quick decisions was recognized. After all, as the Council suggested, what was really being decided in these technical matters of procedure was the place of advisory boards in the total code process. The basic issue was how big a price in the form of hasty and inadequately informed decisions N.R.A. could afford to pay for rapid administration. It might be argued that the advisory functions could be cut out for all but important questions, but that only raised the further question of what was really important. Experience showed that the relative importance of matters coming up for consideration was not at all determined by "the type of container in which they arrive"—that is to say, whether they arose in the preliminary code-making process, or as an amendment, stay, interpretation, or so on. Any of these could be as important as any other, depending upon the issue which happened to be involved. The Council emphasized again that only the boards themselves could determine what was important to the interests they rep-

12 A. C. Decision No. 187, 1935, p. 291.

resented. The compromise suggested by the Council was therefore not that the boards should "be abruptly shunted off the line of communications on this or that arbitrary group of subjects, but that with respect to those types of procedures in which the smallest percentage of important matters fall the boards be merely apprised of developments and supplied with pertinent documents, and be thereafter free to submit reports or objections to deputies if they see fit."¹³

The Consumers Advisory Board not only exercised its advisory function in the process of code formulation and amendment; but it also exercised it, to some extent, in code administration. There was no uniformity in the "authorities" set up to administer the codes. But whatever the form, the authority was in fact controlled by the industry itself, sometimes entirely by the dominant group in the industry, sometimes with representation given to minority groups, but generally with the seat of power in the trade association. The National Recovery Administration kept contact with the individual code authorities after a fashion through the appointment of one or more Administration representatives, with or without voting power, on the governing board of the authority. A considerable amount of discretion was given the code authorities in the exercise of their function, which, in the opinion of most industrial leaders, was one of "self-government within industry." They were not in the mood to brook much interference.

From the beginning, the C.A.B. attached great importance to the development of these code authorities as agencies of industrial regulation. In a formal memorandum to General Johnson on November 28, 1933, the Board stated that: "As the N.R.A. moves into the phase of enforcement and administration, as opposed to code writing, and with the code authority taking shape as the major agency of industrial self-government, this Board feels that the constitution of the authority is of the greatest public importance." The Board urged that a consumer representative be appointed to each code authority,

¹³ *Ibid.*, p. 292.

with or without voting power, but with complete access to all records or other information of the code authority relating to the administration of the code. At the same time, the Labor Advisory Board was urging the necessity of labor representation on the authorities. But with rare exceptions these claims were ignored. Industry was not prepared to share control with these new interest groups.

It was not until the issuance of N.R.A. Office Order No. 81, March 30, 1934, that the C.A.B. and the L.A.B. obtained from the Administrator any formal recognition of their interest in code administration. The order provided for the appointment of a consumer adviser and a labor adviser to the Administration member of the code authority. These advisers were given no administrative responsibility; they were not members of the code authority and could attend meetings only upon request of the Administration member, though they were given the right to appear before the authority to make statements on specific subjects. They were to have limited access to information coming before the code authority, including access to the minutes of all code authority meetings, and of the meetings of all agencies or sub-committees of the authority. They were to keep all information confidential and confine their reports, advice, recommendations, and other statements regarding these industries to the Administration member, the Divisional Administrator of N.R.A., and the appropriate advisory board.

This limited recognition of the consumer interest in the administration of the codes was not satisfactory to the C.A.B., but it was prepared to do as good a job as it could, providing proper financing were arranged so that suitable personnel could be obtained. In private conversation with Administration officials, the C.A.B. was given to understand that it would be asked to nominate the consumer advisers to the Administration members, and that these advisers would be removed if they lost the confidence of the Board. But it was impossible to proceed to formal nominations outside the already overworked staff of the Board until the questions of remuneration and

tenure were satisfactorily worked out. As this was never done, the development of a consumer advisory function in code administration remained very limited. In this situation, it should be pointed out, the C.A.B. was in a particularly difficult position because suitable personnel for the job of consumer representation were hard to find on any terms. Moreover, industry and labor representatives working with a code authority could, if necessary, be financed by their business or labor unions. But there was no private financing for consumer representatives.

In the few cases where a consumer adviser to an Administration member on a code authority was appointed, the effectiveness of his work was determined largely by the character and interest of the Administration member, and by the actual opportunities afforded him to keep in touch with the work of the authority. The C.A.B. had been informally advised by N.R.A. officials that it was desirable for the consumer representatives to be selected with the training, background and general orientation of the Administration members in mind. In a staff report to the Executive Director of C.A.B. on June 8, 1934, it was pointed out that the Administration members were mostly active business or professional men, or army officers, very new to their jobs and with a number of codes to watch. Their task was made extremely complicated by the great variety of trade and regional sub-agencies, which were set up under the code authorities, and over which the authorities themselves at times had little real control. There was usually no provision for public representation on the governing boards of these agencies, which in many cases made the actual administrative decisions. It was almost impossible for consumer advisers to Administration members to function effectively under these circumstances. The Consumers Advisory Board continued to press for a satisfactory solution of the problem of consumer representation on the code authorities, but it came to realize that the most important immediate question was effective Administration representation as a first step in the protection of the consumer interest.

EFFECT OF PERSONNEL ON C.A.B. POLICY

The nature and scope of consumer policy developed by the C.A.B. in the exercise of its advisory functions within the N.R.A. were influenced by the circumstances briefly described above. Perhaps more significantly it was influenced by the character and experience of the personnel of the Board and its staff. Since unofficial consumer opinion was largely unformulated because of the weak and scattered nature of consumer organization, the responsibility for developing consumer policy was thrown directly on the C.A.B., without the help of precedent or organized constituency. What guarantee was there that the policy they developed was in fact the policy best calculated to protect the consumer interest?

The C.A.B., as an operating agency, consisted of a group of unpaid members ultimately responsible for the general policy of the Board, and of a paid staff under the immediate control of an executive director. Consider first the membership of the Board. It is said that General Johnson agreed to the proposal for a Consumers Advisory Board on condition that Mrs. Mary Rumsey should be its chairman, and their friendship survived the official differences that developed between them. Mrs. Rumsey was a daughter of the railroad magnate, E. H. Harriman, who gave her some inside knowledge of the operations of big business; and a sister of Averill Harriman, a prominent business supporter of the New Deal. She herself was a large contributor to the Democratic campaign funds and ambitious for public life. She was a personal friend of Mrs. Franklin D. Roosevelt and several Cabinet ministers, and in Washington shared a house with Miss Frances Perkins, the Secretary of Labor, whose political experience and general interest in consumer problems was an indirect tactical aid to the struggling C.A.B. Mrs. Rumsey was sincerely interested in the development of the cooperative movement, and a genuine admirer of its Irish apostle, A. E. Russell. She was always a picturesque figure, an impulsive and erratic organizer, but persistent in the

pursuit of her ends, and with great driving force. Dr. William F. Ogburn, the first Executive Director of the C.A.B., declared on the occasion of his resignation in August, 1933, that the Board would never effectively represent the consumer interest while Mrs. Rumsey was the chairman. There can be no doubt that, at the beginning, she had no adequate conception of the magnitude of the task she had undertaken and it took her some time to get her bearings. But it was urgent for the C.A.B. in its early fight for status that it should have a promotional leader with entree to the White House. In a report to the Board on March 8, 1935, the Executive Director of the C.A.B. explained that, during the fall of 1934, Mrs. Rumsey had given a large amount of her time to the Consumers Division of the National Emergency Council.¹⁴ "The Board's greatest loss," he reported, "was the lack of her continual driving strength on the whole work of the staff. She was also missed in the relations of the Board with the N.R.A. in general and in relation to the development of interest in the consumer agencies by various Government departments."¹⁵ In December, 1934, Mrs. Rumsey met with a riding accident on her Virginia estate that caused her death.

Two months later, in February, 1935, she was succeeded in the Chairmanship by Mrs. Emily Newell Blair, who had been associated with the work of the Board almost from the beginning. Mrs. Blair was a permanent resident of the Capital and active in its social and political life. She was a member of the first informal executive committee of the C.A.B., and later headed up its Complaints Division. She had thus been in continuous touch with the developing policy of the Board. The delay in her appointment, though the choice was obvious, was due to the peculiar status of the C.A.B. in the administrative set-up. Its status on paper was equal to that of the industrial and labor advisory boards. But, as pointed out above, whereas the chairman of the Industrial Advisory Board had been nom-

¹⁴ See below, p. 70.

¹⁵ C.A.B. Confidential Report of the Executive Director, March 8, 1935, p. 1.

inated by the Secretary of Commerce, and the chairman of the Labor Advisory Board by the Secretary of Labor, the chairman of the Consumers Advisory Board, in the absence of any permanent agency in the government for the consumer, had been nominated by the N.R.A. Administrator himself, with the approval of the inter-departmental Special Industrial Recovery Board. When the time came to appoint a successor to Mrs. Rumsey, the National Industrial Recovery Board, which had followed General Johnson as Administrator of N.R.A., was unwilling to assume the responsibility for naming its consumer adviser, and meanwhile the Special Industrial Recovery Board had been discontinued and its work merged with that of the National Emergency Council. Finally the National Industrial Recovery Board agreed, after informal discussions with the C.A.B., to nominate Mrs. Blair, and the Industrial Emergency Committee of the National Emergency Council finally approved its recommendation.

The original members of the Board, in addition to Mrs. Rumsey, were Dr. Frank Graham, President of the University of North Carolina; Dr. William F. Ogburn, Professor of Sociology in the University of Chicago, formerly director of research for President Hoover's Committee on Social Trends; and two women who held official positions in the League of Women Voters, Miss Belle Sherwin, President of the National League of Women Voters, and Mrs. Joseph J. Daniels, President of the Indiana League of Women Voters.

Because of the weak and uncoordinated nature of consumer organization at this time, there was no obvious roster of consumer leaders from which Board members could be drawn. To ensure effective representation of a consumer point of view, frequent additions, both of full and of consulting members, were made to the Board throughout its life. Some of these members might be considered as representing the "academic" consumer interest, some the "organizational", and others were technical experts. In addition to the original members, members of the Board who attended meetings fairly regularly dur-

ing its first formative months included Dr. Frederick C. Howe, Consumers Counsel of the Agricultural Adjustment Administration; Dr. Gardiner C. Means, economist from the staff of the Secretary of Agriculture and co-author with A. A. Berle, Jr., of the distinguished study, *The Modern Corporation and Private Property*; Dr. James P. Warbasse, President of the Co-operative League of U. S. A.; Dr. Robert S. Lynd, Professor of Sociology at Columbia University, who had prepared the section on "The People as Consumers" in *Recent Social Trends*; Dr. George Stocking, Professor of Economics in the University of Texas and an expert on the petroleum industry; Dr. Walton H. Hamilton, an economist and Professor of Public Law at Yale University; Dr. Paul H. Douglas, Professor of Economics of the University of Chicago; Mr. Huston Thompson, of Washington, D. C., formerly a member of the Federal Trade Commission; Dr. Stacy May, economist, with the Rockefeller Foundation and co-author of *The Public Control of Business*; Mrs. Grace Morrison Poole, of the General Federation of Women's Clubs, and Miss Mary Dewson of the National Consumers League. One noticeable omission was the lack of representation from Consumers Research, Inc., a commodity testing organization set up in the consumer interest, following the publication in 1927 of *Your Money's Worth* by Stuart Chase and F. J. Schlink. Mr. Schlink, then Technical Director of Consumers Research, seemed to many of his friends a suitable person for appointment to the C.A.B. But there were members of the Board who were fearful of the effect of his vitriolic militancy on the N.R.A. authorities. Later, as he developed an attitude of open hostility to the Board because of its conciliatory tactics, closer association became difficult.

There is no evidence that the N.R.A. Administrator interfered in any way with the selection of Board members by Mrs. Rumsey or that he withheld approval from any of her nominees.

The final responsibility for the advice given by the C.A.B. staff in the exercise of their advisory functions rested on the Board members, and, during the formative period, that responsibility was immediate and direct, since no formal executive committee of the Board was set up until the end of 1934. At the beginning, meetings of the Board were held every two weeks, but as the executive staff became more effectively organized, meetings tended to become irregular and less frequent and determined by the emergence of major issues. Minutes of the early Board meetings indicate considerable division of opinion both on procedure and policy, but later the tendency was for the Chairman of the Board or the Executive Director to suggest lines of policy and appropriate action which usually met with the approval of members of the Board. The Board itself thereafter tended to become advisory to and a public bulwark for the staff, rather than the effective policy-making body.

The scattered membership of the Board and the inability of members to keep in close touch with the daily pressure for action in Washington were felt to be a serious weakness in the struggle for consumer protection, and during 1934 various plans were devised for building up from it a more coherent body both for the better direction of the staff and for the creation of a more informed public opinion. This problem of effective Board organization was particularly pressing in the summer of 1934 when Mrs. Rumsey was giving most of her time and energy to the work of the new Consumers Division of the National Emergency Council.¹⁶

The only action taken was to decide on a formal executive committee of the Board, though the committee was not actually set up until after Mrs. Rumsey's accident in December, 1934. The new executive committee was composed of four members of the Board; Mrs. Blair; Dr. Lynd; Dr. Willard Thorp, Director of the Consumers Division, N.E.C., and Dr. Thomas C. Blaisdell, Jr., formerly Assistant Consumers Counsel of A.A.A.

¹⁶ See below, p. 70.

and, at the time, Executive Director of the C.A.B. To these were added Dr. Louis Bean, economist on the staff of the Secretary of Agriculture, who had been giving considerable study to the relation of industrial problems to agriculture; and Mr. George Renard, Secretary and Treasurer of the National Association of Purchasing Agents, which had given the Board considerable help in its research into problems of industrial control and industrial practices. "As I look back over the months," said the Executive Director in March, 1935, "I cannot see how the work of the Board could really have been accomplished without the advice and active work which this Committee has given."¹⁷

The continuous, day-by-day burden of C.A.B. work was carried by the Executive Director and his staff. Dr. Ogburn, one of the original members of the Board,¹⁸ was the first Executive Director, but he resigned on August 14, 1933, convinced that the consumer interest could not be protected under the N.R.A. set-up. He was succeeded later in the month by Dr. Dexter M. Keezer, formerly Professor of Economics at Dartmouth College, Associate Editor and Economist of the *Baltimore Sun*, and a well-known "anti-trust" man. Keezer retained the office of Executive Director until the end of July, 1934, when he left for Reed College, and Dr. Blaisdell, of the Consumers Counsel Office, A.A.A., took it over. Early in 1935 Dr. Blaisdell became Director of the Consumers Division of the N.E.C., and Dr. Corwin Edwards, an economist and chief of staff of the C.A.B. and its assistant director, exercised executive responsibility until the following May, 1935, when the Schechter Decision of the Supreme Court invalidated the National Industrial Recovery Act.

It was, of course, some time before the most effective form of staff operation was worked out. Dr. Ogburn had brought two economists from the University of Pennsylvania to help as advisers in the process of code formulation, and in the

¹⁷ Confidential Report to Board by Executive Director, March 8, 1935, p. 3.

¹⁸ See above, p. 40.

preparation of formal reports to the deputy-administrators. These reports, it was agreed by the Board, should all go through the Executive Director's hands to keep the line of responsibility clear. The code drafts were now coming in with overwhelming rapidity, and an attempt was made to obtain part-time advisers to work on codes for industries with which they were specially familiar, as was being done by the industrial and labor advisory boards. It was impossible, however, to get an adequate staff of consumer representatives on this basis. After Dr. Keezer took office, a permanent code advisory section was built up, first under the direction of Dr. W. Loucks of the University of Pennsylvania, and then of Mr. L. F. Boffey of the National Association of Purchasing Agents. Some advisers were lent by the Federal Trade Commission. It proved an extremely difficult task to find personnel with a sufficient knowledge of industrial practices to be intelligent on their job and at the same time able convincingly to present a consumer point of view. In its search for personnel the Board was further greatly handicapped by the fact that it was never able to make attractive offers in either tenure or salary.

In considering the quality of work done by the consumer advisers, it must be remembered that the conditions of work were hectic. It was sometimes necessary for advisers to attend two or three public hearings as well as informal conferences in one day. The industries involved might be "as diverse as those purveying powder puffs and hoisting machinery, chewing gum and heavy railroad equipment."¹⁹ The Board had no power other than persuasion, and the advisers had to be effective in persuasion both in private conference and at public hearings before deputies who usually had little sympathy with their point of view. Business advisers knew the problems of their industry from the inside and labor advisers were as a rule well-informed on questions affecting labor relations. But "there just are few technically equipped representatives of the

¹⁹ Statement by Dexter M. Keezer at Cornell University, April 19, 1934, p. 1.

consumer," as Dr. Lynd has pointed out.²⁰ Consumer advisers had to have both technical skill and social imagination. The nature of the subject matter of the codes meant that it was necessary to have an intimate and sure knowledge of the practices of the trade in order to be aware of the implications of actual or suggested phrasing and to be proof against being told that "It can't be done." The adviser had not only to know as much as possible about particular industries, but he had also to know how to ask pertinent questions, questions on industrial policy, accounting and pricing practices, existing controls, questions on manufacturing, wholesaling and retail distribution. And he had to be able to present the consumer point of view, as developed by the Board, in any particular situation that might affect the consumer interest.

On October 30, 1933, Mr. Boffey, then chief of the code section, presented to the Board an illuminating report explaining the procedures and problems involved in organizing his staff. By that time the code section had 16 members. The procedure followed was, first, an analysis of code provisions. This preliminary analysis, which Mr. Boffey considered very important, was the task of four advisers who had had experience with the Federal Trade Commission. Before the draft codes came up for preliminary conference the attention of the special code advisers was thus drawn to provisions contrary to the Board's policy, and as that policy was more completely formulated, the preliminary analysis became correspondingly more specific.

For the most part, special advisers, of whom at this time there were eight, had some practical business experience. Some of them were from the purchasing agent group. Generally they had had little experience in economic research. Some, in the words of the Boffey Report, "just thought it necessary to recognize and proclaim, others tried to prove and convince by argument and evidence." At this time, mainly from lack of essential data, the consumer attack, as Mr. Boffey explained,

²⁰ Interview with Robert S. Lynd.

"rested largely upon general principles bolstered by very spotty, uncertain and not too ably employed information and data." By the summer of 1934, after members of the price section of the Board had been merged with the code staff, the character of this work changed considerably, and detailed studies were made of the organization and operation of selected industries under the codes.

During the first eight or nine months, the special advisers submitted their reports to supervisors who prepared the final reports for the deputies. These final reports, usually two or three pages in length, supporting or criticizing particular provisions in an industry code, represented the application of consumer policy as developed by the members of the C.A.B., and it was of course essential that opinions expressed on particular issues should conform with the general outline and trend of Board policy. This made it necessary for the staff to be kept in close touch with the developing policy of the Board and also for the Board to be realistic in its approach to policy-making and therefore in close touch with conditions on the "firing line."

In the hurly-burly of the times, the most effective relationship between Board members and advisory staff was not always satisfactorily maintained, but its desirability was clearly recognized. To further it, Dr. Ogburn, when Executive Director of the C.A.B., began a practice of issuing brief policy guides to advisers. This was developed under Dr. Loucks and Dr. Keezer who, early in September 1933 prepared a statement on "Tentative Policy in Handling Codes." This was distributed to the staff for comment and after some revision was issued later in the month by the Board as a comprehensive "Policy Guide." It was further revised from time to time as policy developed. The Guides were confidential documents for staff use, though a general summary of the September 1933 issue was released to the press. They were submitted as supplementary data for the N.R.A. records at the Price Hearings in January, 1935.

Limited discretion was permitted the code advisers, but important issues that seemed to call for a deviation from general policy were usually handled by the Executive Director himself, as for instance when he personally acted as adviser on the book-sellers' code in which a provision for a fixed mark-up was approved by the C.A.B. under rather exceptional circumstances. Generally speaking there was no advantage to consumer representatives in "compromise," except in some instances in the deliberations of the Advisory Council, for they had little bargaining power when they could not persuade. Nevertheless, it was considered important to maintain a close supervision of the formal reports by advisers to deputy administrators, and though various changes were made in routine procedure during the life of C.A.B., the executive officers retained substantial control over the form and content of the reports.

Considering the varied training and experience of the members of the advisory staff, it is significant that they were usually in full agreement with the Board's policy relating to the formulation and administration of the codes. When they disagreed it was on issues connected with the relations of the Board to the National Recovery Administration and to the public.

In March, 1935, the code staff, which had been divided earlier into five groups, consisted of a chairman for each group assisted by a total of 28 advisers.

In addition to the Code Section, the staff of the Board included, for different periods of time, other sections doing specialized work relating to the exercise of the Board's functions. The N.R.A. was hardly in operation before complaint letters began coming in from individuals and groups who felt that their interests were being adversely affected. For several months all complaint letters, whether from consumers or business men, were handled by the C.A.B. through a Complaints Bureau, of which Mrs. Blair became chief. One of the early differences between Dr. Ogburn and Mrs. Rumsey developed in connection with the setting up and staffing of this Bureau. Mrs. Rumsey did not at first realize the importance of handling

these complaints as part of a consumer case against rising prices. If, as it seemed at the beginning, the main function of the Board was to help prevent profiteering, it was of the first importance to try to get an answer to the question, "What was a fair increase in price of a commodity as the result of increased costs incurred under N.R.A. codes, and also under the A.A.A. program?" The Consumers Counsel, A.A.A., was already trying to answer this question with reference to a few agricultural commodities, particularly cotton and bread. Dr. Ogburn insisted that the C.A.B. was undertaking an impossible task unless it developed an adequate price-collecting and price-analysis service, and he was of the opinion that the Complaints Bureau could help to feed such a service.

After Dr. Ogburn's resignation, Mrs. Rumsey soon came to see the need for developing criteria to determine a "fair" price increase. Early in September, Dr. Corwin Edwards was brought down from New York University to begin the exploration of two fields of inquiry: first, to determine what was happening to national purchasing power as the result of changes in income and in prices; and, second, to find some way to check on the reasonableness of particular price increases. To assist him he gradually brought together the Board's Price Section. Meanwhile, he was also trying to give advice to the Complaints Bureau on handling individual complaints; and at the same time he was using the price information given in the complaint letters to build up a price picture for different industries. The main work of the Price Section soon shifted to this latter field, and particularly to a series of studies on prices and price policies that were submitted at the special price hearings held by the N.R.A. in January, 1934. After these January hearings, the Price Section was asked to cooperate with other divisions of the N.R.A. in an ambitious study of the "open-price system." On the completion of this study in April, 1934, the Price Section as such was absorbed into the Code Section as a result of the new N.R.A. policy to concentrate all "economic research" in the N.R.A. Research and Planning Division. The result,

however, was a more basic study of price and production policies in a few selected industries, which led to a number of valuable statements submitted by the C.A.B. at the second series of N.R.A. price hearings in January, 1935. The "Complaints" correspondence which for a short period had been under the control of the C.A.B. Price Section had already been transferred to a new division of N.R.A.

In January, 1934, another section was added to the C.A.B. staff with the establishment of a Standards Unit under Dr. Robert A. Brady, Professor of Economics at the University of California, and author of a study on industrial standardization for the National Industrial Conference Board.

The C.A.B. from the first had recognized the importance of getting provisions into the codes for the development of quality standards for consumer goods. It was soon realized, however, that a great deal of work had to be done before such provisions could be administratively established. The Board had therefore set up a committee under the chairmanship of Dr. Robert Lynd to explore the whole problem of quality standards for consumer goods; Dr. Caroline Ware, and Dr. Thomas C. Blaisdell, Jr., were the other members of the Committee.

On December 1, 1933, the Lynd Committee issued a report in which, after canvassing the whole situation, they recommended the establishment of a Consumer Standards Board to be set up jointly by the C.A.B. and the Consumers Counsel Office, A.A.A. The organization and functions of the proposed Consumer Standards Board were discussed in detail. The Committee had carefully considered the possibility of developing consumer standards work through an existing bureau of the government, but decided against it. The Bureau of Standards, of the Department of Commerce, seemed the most obvious bureau for the purpose, but in addition to its sharing the disadvantages common to all existing bureaus, the Committee reported that: "The Bureau of Standards is not recommended for the task because of its location in the Department of Commerce, and the fact that the past history of its Com-

mercial Standards Division, its planned future close cooperation with the industrially affiliated American Standards Association, and the presence of research workers supported by industry in its laboratories, all give it a traditionally industrial approach. Although a Consumer Standards Board must lean heavily upon the technical division of the Bureau of Standards for basic research and testing and upon its Commercial Standards Division for cooperative contacts with industry, it cannot leave to the Bureau the task of representing the consumer point of view and developing standards which fully meet consumer needs." ²¹ The Lynd plan, it should be noted, did not involve the setting up of new laboratories, but the utilization of existing technical facilities at the Bureau of Standards, Department of Agriculture and elsewhere.

The Consumers Advisory Board approved the suggestion of the Lynd Committee for a Consumer Standards Board, but could not get enough support to have it established. There was considerable interdepartmental opposition to the proposal. Moreover, there was some question raised as to the desirability of having a Consumer Standards Board with permanent functions set up as an adjunct to such a "theoretically unstable unit" as the Consumers Advisory Board. Dr. Lynd had argued that the need for some form of permanent consumer agency in the government would be recognized by the time the C.A.B. had finished its work, and that such an agency would form a suitable home for the proposed Standards Board. But the Standards Board was not set up.

Meanwhile, the Consumers Advisory Board had decided to set up its Standards Unit under Dr. Brady, who continued to canvass support for the proposed Consumer Standards Board but without result. With a few assistants and meager resources he set about his immediate tasks, which were later summarized by the N.R.A. Advisory Council ²² as follows: (1) studying

²¹ *Proposal to Develop Standards for Consumer Goods*, Consumers Advisory Board, N.R.A., p. 7.

²² A. C. Decision No. 142, 1934, p. 168.

the general problem of standardization, grading and labelling in connection with problems of fair competition under the codes; (2) the encouragement of the use of standardization, grading, and labelling as efficient industrial practice; (3) the adequate protection of the consumer; (4) the encouragement of competition on the basis of publicly known and governmentally approved standards. The Standards Unit worked out a standards formula for inclusion wherever possible in the codes, aimed at the gradual development and acceptance of quality standards for consumer goods. They made specific studies of standards in relation to a number of industries, notably for silk goods, the dry cleaning industry, fresh and canned fish, the household ice refrigerator industry, and the hosiery industry. The Unit came to be looked upon by N.R.A. officials generally as the principal research center in N.R.A. for quality problems. No attempt appears to have been made to diminish the Unit even when, about the middle of 1934, most formal research work in the N.R.A. was concentrated in the Research and Planning Division. But Dr. Brady became discouraged by the meager resources available for so great a task, and he left the Board in the early summer of 1934. The Standards Unit was then without an effective head until the spring of 1935, though Dr. Blaisdell, after he became Executive Director of the C.A.B. in the fall of 1934, devoted a considerable amount of time to this aspect of the Board's work.

A staff report to members of the Board on the work of the Standards Unit dated March 8, 1935, referred particularly to the unsuccessful efforts made to have provisions for quality standards and labelling included in the various codes. As a result of the work done by the Unit, however, the whole question of the responsibility of the N.R.A. toward stimulation of standardization, grading, and labelling was now being given much more active attention by N.R.A. officials. A member of the staff of the N.R.A. Research and Planning Division had been definitely assigned to work with the Standards Unit on this problem. Moreover, in March, 1935, the National In-

dustrial Recovery Board was considering the appointment of a special officer to be responsible for the promotion of grading and labelling provisions in the codes.

The Standards Unit also did a considerable amount of promotional work with representatives of different industries and private associations engaged in grading and standardization work. Contacts with trade journals resulted in an increasing number of articles on consumer standards and widespread discussion in these journals of the consumer angle of the problem. A survey by the Standards Unit of the problem of quality nomenclature revealed considerable confusion in the terms used—e.g., U. S. Grade No. 1 cheese was actually the third grade due to the use of concealed top grades; misleading superlatives as well as such concealed top grades were frequently used; the use of terms was not standardized, “fancy” apples, for example, being top grade, but “fancy” brooms second grade; and so on. As a result of this study on nomenclature and in view of the limited resources of the Standards Unit, the Consumers Advisory Board asked the American Standards Association to undertake the difficult and involved task of developing a model system of simple and unequivocal terms for general use in quality labelling of consumer goods. The Association, after a long discussion of the problems involved, finally agreed to proceed with the undertaking. Dr. Agnew, of the American Standards Association, after consultation with representatives of various groups and the Standards Unit, recommended the appointment of a number of small advisory sub-committees to deal with the nomenclature problem for various groups of industries, with consumer members on each sub-committee. This led to the setting up by the A.S.A. of its Committee on Ultimate Consumer Goods.

In addition to its promotional work among representatives of industry, the Standards Unit also tried to bring about closer coordination between the technical agencies of the Federal Government working on quality problems, particularly the Bureau of Home Economics, the Bureau of Agricultural Economics,

and the Bureau of Standards. It acted also as a clearing house for information on questions of quality for the County Consumers Councils set up by the Consumers Division, N.E.C.²³

However, important though this promotional and coordinating work was, the early plans for the expansion of the Standards Unit into a spearhead of consumer attack on the problem of quality grading and labelling were never effectively developed; this was partly due to the fact that Mrs. Rumsey still hoped that the Consumers Division, N.E.C., might become a permanent consumer agency in the Federal Government and therefore, the appropriate center for standards work. Nevertheless, the Standards Unit of the C.A.B. was the one section that survived the disintegration of that agency.²⁴ It is now functioning as a W.P.A. project in the Consumers Counsel Office, A.A.A.

The function of the Bureau of Economic Education set up as part of the Board's staff under the direction of Dr. Paul H. Douglas of Chicago University will be discussed below.²⁵

In bringing to an end this outline of the organization and personnel of the C.A.B., it seems appropriate to quote an opinion expressed by Dr. Keezer that the C.A.B. staff was "the most economically literate group in the N.R.A." Constantly overworked, its members nevertheless showed a spirit of loyalty and high morale which can only be attributed to their sense of the great importance of the work they were doing.

INFLUENCE OF C.A.B. POLICY ON N.R.A. CODES

The formulation by the Board of what it considered a consumer point of view toward the complex problems of industrial regulation under the N.R.A. was itself a major achievement and should be part of the well-preserved heritage of the organized consumer movement. "In the long view," said Mrs. Blair before the Senate Finance Committee in April, 1935,²⁶ "this formulation of consumer policy and its use in any future de-

²³ See below, p. 70.

²⁴ See below, p. 88.

²⁵ See below, p. 62 *passim*.

²⁶ *Op. cit.*, p. 968.

velopment of consumer protection policy may become of such benefit to the consumer as to compensate for any penalties he has suffered from high prices resulting from the codes." Because of the continuing significance of the consumer policy hammered out by the Board on the anvil of N.R.A. experience, an outline of it is given in the next chapter.

But the actual influence of this policy on the N.R.A. codes, both in their formulation and in their administration, was negligible. During the first year of the N.R.A. the C.A.B. found itself in conflict with the position taken by industry on fundamental issues relating to price fixing, direct and indirect, and methods of production control, and was unable to persuade the N.R.A. executive officers to its point of view. By the second year of the experiment, official N.R.A. policy had been considerably modified so that it approached the consumer position in many respects. Most of industry, however, was by that time under code, and changes in official policy could only be reflected in code provisions as these came up for revision, which was infrequent. Efforts by the Board to speed up the revision of codes were, generally speaking, unsuccessful. It has to be remembered in this connection that the N.R.A. experiment ran less than two years.

Under the circumstances, the C.A.B., throughout its brief life, was continually facing the question, what responsibility has an advisory body for its advice? How much effort should it exert to make its advice effective? The advisory boards had no legislative status. They had no administrative responsibility. They were an experimental device of the Administration for representation of special interests, with a role that was not clearly defined. "My whole theory of administration," wrote General Johnson in the *Blue Eagle*,²⁷ "was to make the N.R.A. a form of controversy." It has to be remembered that the N.R.A. was basically a law-making body. Congress delegated to it wide powers for the formulation of industrial regulations

²⁷ Hugh S. Johnson, *The Blue Eagle from Egg to Earth*, 1935, p. 211; see also p. 285.

through the code process, as well as for their enforcement. In the making of this administrative law, the controversial form of administrative procedure adopted by N.R.A. was democratic, in a functional sense, up to the point of final determination of law. The official responsibility for that final determination was carried by the Administrator and, behind him, the President.

In reply to a memorandum from the Consumers Advisory Board reporting a formal resolution of the Board opposed to discrimination against cooperatives, General Johnson wrote, October 10, 1933: "I agree that the cooperative movement should be encouraged but every case must be considered on its merits in view of the known facts. Furthermore, the function of an Advisory Board is to advise and not make records of resolutions which may be contrary to the policy of the Administration of which you are a part."

The problem lay in a two-way responsibility. For in its function of advice each Board was representing an interest group, and the fact that the consumer interest was ill-organized and consumers generally inarticulate made the responsibility of the Consumers Advisory Board for its advice greater rather than less. Mrs. Rumsey was a personal friend of the Administrator and anxious for the success of a New Deal experiment. But she gradually became convinced by the work of her staff that the program being developed under the N.R.A. threatened, in the long run, to militate against the interests of the group she officially represented.

Reasons for Weakness of C.A.B. Position

In attempting to explain the reasons for the negligible effect of C.A.B. policy on the code system and program, the circumstances under which the National Industrial Recovery Act was passed must first be recalled. It was emergency legislation, enacted for two years as part of the New Deal program of recovery. The Administration was desperately anxious to get the unemployed millions back to work. Powerful support from Labor and Industry was behind the Act. Organized Labor was

at last to get not only minimum wages and maximum hours (mainly to "spread the work"), but also the right to bargain collectively—in short, the achievement of its most important objectives. Industry was eager to seize the opportunity which seemed to be offered by the proposed code system to reduce the competitive pressures which in its opinion made profits insecure.

There was, therefore, a tremendous drive to get the N.R.A. under way. General Hugh Johnson, the Administrator of N.R.A., was himself obsessed by the necessity for speed. His idea seems to have been to get industry under code as quickly as possible on whatever terms were made necessary by the interests powerful enough to get a hearing, even if the various objectives were mutually exclusive. Revision could come later. It is hardly to be wondered at that he was irritated by the seemingly "obstructionist" tactics of the Consumers Advisory Board in persistently opposing a wide range of code provisions that were being demanded by business as the price of its co-operation. Over in the A.A.A., his friend, Administrator Peek, was being held up in his plans by a "left-wing brain trust." The flight of the Blue Eagle was not to be stayed by such considerations.

"Since the codes were voluntary," wrote Mrs. Blair in the October 15, 1935, issue of *The Consumer*,²⁸ "they were necessarily drawn up and presented by industry and so naturally reflected industry's viewpoint. The role of the consumer representative was, therefore, that of an obstructionist—often in the opinion of the industry concerned and also, it must be confessed, of the Administrator himself, a nuisance."

In trying to get its advice accepted under these circumstances, the C.A.B. had to lean on three weak props—facts, publicity, and the consumer constituency.

As was pointed out by R. L. Duffus in a special article in the *New York Times*,²⁹ August 27, 1933, the pressure the C.A.B. could bring to bear was "merely the pressure of the facts it

²⁸ Published by the Consumers Division, N.E.C., see below, p. 85.

²⁹ Section 9, XX.

can accumulate, which so far have necessarily been somewhat scarce." During the first few months, such statistics as were available seemed to indicate an increase in total purchasing power in the country, and that was the Administration's objective. For a group of intellectuals to theorize about the possible effect of code provisions on the future control and condition of industry, and in so doing to confuse and delay the code-making process, seemed to the administrative mind dangerous nonsense. This was an understandable line of reasoning. It has to be remembered that the facts available to support the arguments of the Board, were, especially in the early months of N.R.A., fragmentary and inconclusive. "Throughout its work the Board has been hampered by the unavailability of data on prices and costs," Mrs. Blair explained to the Senate Finance Committee, April, 1935;³⁰ "lacking them, it was forced to develop policy on the basis of past experience." This was especially true before the special C.A.B. studies on price and production policies were available. Dr. Keezer recurrently pointed out that the facts essential to an intelligent comprehension of the structure of our economic system and the manner in which it is controlled had gone relatively unexplored.

From their earliest meetings, Board members were agreed that the most effective immediate weapon they could use was publicity. Dr. F. C. Howe, Consumers Counsel, A.A.A., had developed a definite publicity program: press interviews, radio programs, and such public releases as passed the censorship of the A.A.A. publicity director. Members of the C.A.B. passed various resolutions for developments along similar lines, but the minutes of the Board on this subject invariably conclude with the remark, "no action taken," implying presumably that no formal action was taken to implement the resolutions. All publicity had to be approved by the N.R.A. publicity division under Charles Michelson, director of N.R.A. public relations, and as a rule, if it contained any controversial matter, it got no

³⁰ *Op. cit.*, p. 967.

further. Dr. Ogburn was able to get some press notice for the Board's problems when he made public his letter of resignation to General Johnson; but the public interest was temporary.

The issue of publicity became acute in September, 1933, during the hearings on the draft of the retail code. There was a bitter intra-industry fight on various provisions of this code, some of which gave special concern to C.A.B., particularly the provision for a compulsory 10% mark-up on invoice prices. The C.A.B. decided to take a vigorous stand against this provision. They prepared a well-considered statement on the subject, September 9, 1933, but General Johnson refused to permit its release to the press. The official position was that the C.A.B. could not openly criticize the policy of the National Recovery Administration of which it was a part.

This publicity issue was especially important for the C.A.B., because its members could not command as wide attention from public platforms in an unofficial capacity as could members of the labor and industrial advisory boards. Sidney Hillman, for instance, could bring any issue before the public from the platform of the Amalgamated Clothing Workers of America. The same was true of many leading manufacturers. In October, 1933, the whole question of publicity was discussed at a Board meeting of the C.A.B., when the Executive Director read a list of C.A.B. releases which had been suppressed or modified by the N.R.A. publicity office.

What was the Board's responsibility in the matter? The consensus of opinion among Board members, as recorded in the minutes, was that "no strongly aggressive protest should be made at this time." It was agreed that the situation called for "careful and diplomatic procedure." Members expressed confidence in any decisions of procedure which might be made by the Chairman and Executive Director of the Board, and approved the drafting of a statement to be sent to General Johnson and Mr. Michelson. The subsequent statement was as follows: "It is the unanimous sense of the Consumers' Advisory Board that the publicity bureau give more and freer publicity

to the position and action of the Consumers' Advisory Board on vital issues in code-making. In view of the organized power, influence and activity back of both the Industrial Advisory Board and the Labor Advisory Board, well-conceived public releases from the Consumers Advisory Board are needed to insure public confidence that the consumers' interests are being definitely taken into account. Such a policy is needed for the development of the intelligent public opinion indispensable to the continued support and success of the N.R.A."

The basic weakness in the position of the C.A.B., however, was the lack of an effective pressure group behind it. It was a "spearhead without a shaft."³¹ The N.R.A. code-making process reflected largely the strength of different pressure groups. At the 1935 Senate Finance Committee hearings on N.R.A.,³² the following discussion took place:

SENATOR CONNALLY: "... they recognized the necessity for such a board, but when they set it up they pulled its teeth so that it could not bite."

SENATOR BLACK: "They never gave it any teeth."

DR. BLAISDELL: "The same thing might be said for the Industrial Board and the Labor Board, but they seemed to have very strong teeth outside."

The difference between the power and effectiveness of the C.A.B. and of the industrial and labor advisory boards was not due to any difference in function, as Mrs. Blair explained at the same Senate hearings. The administrative design was formal and balanced. The difference

was the result of a situation. Back of these two other boards were organized articulate interests outside the National Recovery Administration. Behind the Industrial Advisory Board were the various trade organizations which knew what they wanted and were organized to speak out and demand it. Behind the Labor Advisory Board were labor organizations which also knew how and when

31 R. G. Tugwell, *The Battle for Democracy*, 1935, p. 268.

32 *Op. cit.*, p. 640.

to speak up. Back of the Industrial Advisory Board was an executive department of the Government created to look after the interests of industry, the Department of Commerce. Back of the Labor Advisory Board, the Department of Labor. The Consumers Advisory Board, hung, as it were, in mid-air.³³

The C.A.B. was able to get its advice accepted in its fight for cooperatives³⁴ mainly because the organized force of both the farm and consumer cooperative movement was mobilized behind Mrs. Rumsey. Considerable support was also developed for the proposed quality grades for canned goods,³⁵ though the proposals were not accepted. But it was only on such rare occasions that the C.A.B. felt the strength of a pressure group behind it. Such unofficial consumer organizations as existed lacked the finances to send representatives to code hearings or into private conferences with deputy administrators to persuade them to a consumer point of view.

At the time the C.A.B. was set up, the vast mass of consumers were inarticulate. Effective organization in the consumer interest was limited to a few women's groups with consumer programs, consumer cooperatives under the leadership of the Cooperative League, and Consumers Research, Inc., a commodity-testing organization; the National Consumers League was almost exclusively concerned with labor standards. The efforts of these various groups to promote the consumer interest were uncoordinated and directed towards limited objectives. During September 1933 some of the consumer groups centered in New York City developed plans to strengthen the consumer position by setting up an Emergency Conference of Consumer Organizations (E.C.C.O.). Cooperative leaders took a prominent part in this development, and members of Consumers Research, Inc., were also actively interested. They were "deeply concerned about the need to protect consumers interests by militant action," particularly with reference to the

³³ *Ibid.*, p. 966.

³⁴ See below, p. 163.

³⁵ See below, p. 168.

N.R.A. program. The new E.C.C.O. had the unofficial support of some members of the C.A.B. but others were nervous about any association with a group in which F. J. Schlink of Consumers Research, Inc., was interested, even though he was not one of its officers.³⁶

The Emergency Conference was never strong enough to form an effective pressure group and was not able financially to send representatives to code hearings, but there was no question that it represented a genuine consumer point of view. Its representatives met formally with the Board at different times and furnished it with material on trade practice policies affecting the consumer interest. But the association was never close and E.C.C.O. consistently played the role of critic of the Board for its "conciliatory tactics" within the N.R.A. It maintained that the C.A.B. had a mistaken idea of loyalty to the National Recovery Administration instead of to the fundamental purposes of the National Industrial Recovery Act and suggested there was a real danger to the consumer interest in continuing "the pretense that the consumer was getting protection in the N.R.A." It acted as a gadfly, on occasion stinging not only the C.A.B., but General Johnson himself. On December 11, 1933, in a letter to Mrs. Rumsey it called on the C.A.B. to resign "unless they could function more effectively in the consumer interest."

Professor Robert Lynd took up this question of resignation in a radio debate with John T. Flynn on December 23, 1933:

FLYNN: Is it not true that Johnson has treated them (C.A.B.) as a bunch of impudent intruders who were trying to slow up his big circus . . . ?

LYND: The C.A.B. is in the tough spot of being thoroughly damned by some of the powerful leaders inside the N.R.A. for doing too much for the consumer and of being lambasted on the outside . . . for not doing enough for the consumer . . . I cannot

³⁶ The officers of E.C.C.O. were Frederick R. Hoisington, Jr., Chairman; J. Charles Laue, Executive Secretary; Meyer Parodneck, Treasurer; A. Anton Friedrich, Consulting Economist; T. G. Herendeen, Statistician.

speak for other members of the C.A.B., but it is my impression that all of us have faced rather squarely the alternatives of resigning and getting out or of hanging on to see the job through . . . we are playing for the long haul, blocking price-fixing in the codes, eliminating what abuses we can and, where we cannot, getting our case written into the record; recommending the inclusion of quality standards—and in a few cases getting them—and generally building for the future in cases where we can't make immediate advances. There may be some danger that the whole code procedure under the N.R.A. will sideslip into the hands of industry and the C.A.B. be knocked on the head and thrown out on the scrap heap . . . Meanwhile there are chances of real gains. The position of the consumer is becoming steadily stronger in Washington under N.R.A. and the A.A.A. and if time is on our side, present work may grow into a very tangible permanent nucleus of consumer work under the federal government . . . the government . . . is not yet in earnest about the consumer. We are a nation ruled by pressure groups, and the consumers have no pressure group in Washington . . .

There was a very real danger at this time that the Board would be abolished. This had been publicly threatened by the Executive Officer of N.R.A., who gave a press conference "the impression that the C.A.B. was a bad, bad child."³⁷ By resigning as a body the Board might have achieved a momentary publicity for the consumer cause, as Ogburn's resignation had done earlier. But the consumer interest had little news value and the question was whether it was better to have the C.A.B. or nothing. Looking back on the work of the Board from today's perspective, on its developed policy statements and the data collected to support them, and having in mind its increasing influence on the Administration during the second year of the N.R.A., there is no doubt that resignation would have been a great loss to the consumer cause.

C.A.B. Tries to Organize a Constituency

Meanwhile Mrs. Rumsey had been developing plans by which the C.A.B. would itself build up a consumer constituency throughout the country on a county-wide basis. Dr. Howe,

³⁷ See Consumers National Conference bulletin, January, 1934.

Consumers Counsel, A.A.A., had earlier conceived the idea of interesting the National Conference of Mayors and other bodies to set up local consumer councils, and a few had actually been set up. Mrs. Rumsey, who was familiar with different forms of community organization, particularly with the community councils promoted by the Council of National Defense, had still larger plans. She now proposed to take the initiative in organizing directly a consumer council in each of the 3000-odd counties.

At the beginning Mrs. Rumsey does not seem to have had any very clear idea as to what the functions of these councils would be. In a general way, she expected that they would further the basic purposes of the National Industrial Recovery Act by stirring up local sentiment against high prices and checking on and reporting unfair price increases; but they were also to form a channel of communication through which consumers could become articulate.

The Consumers Advisory Board itself was divided on this proposal. Some members of the Board feared that so large a job would draw energy away from advisory work. Others hesitated at the idea of a government agency organizing an economic interest on such a wide basis, even though it was presumably representative of that interest. Dr. Keezer himself spoke of it as an "unprecedented experiment," though he realized well enough the essential weakness of the Board without a pressure group behind it. He spoke of the proposal as a "step in the direction which most people say any hopeful plan to strengthen the position of consumers must take—that of organization."³⁸

The proposal had to have the approval of General Johnson and other New Deal leaders, and Mrs. Rumsey had "to wait for some of the tumult and shouting to die" before she could get a hearing. It was not only a question of getting the ear of the authorities. Questions that had been raised among members of the Board were less sympathetically asked outside. What

³⁸ Address at Cornell University, April 19, 1934, p. 12.

type of programs would the councils develop? What form of pressure would they exert? To what extent would they represent a genuine consumer interest? Should they be groups chosen from various existing organizations such as labor unions, women's clubs, consumer cooperatives, farmer organizations, and so on, or should they be chosen from a group of intellectuals who might have some theoretical conception of what the consumer interest is?³⁹

Mrs. Rumsey used all the influence at her command, secured the cooperation of Secretary Wallace and Secretary Perkins, and gained the approval of the President. It was proposed that the "Recovery Committees" which had been set up in a great many areas to support the Blue Eagle should be utilized in developing councils to protect the "interest of the consumer under the Eagle's sway." General Johnson was won over, and on October 9, 1933, an N.R.A. release announced the establishment within the C.A.B. of a Bureau of Economic Education to organize county consumers councils. The Bureau was to collect material of use "in formulating and carrying out consumer education in line with the objectives of the recovery program. The intention is to explain in simple language how the program is affecting the fortunes of the consuming public, and to persuade the public of the reasonableness of acting—as consumers—in support of the program."

In addition to their functions as local outposts "through which a mass of economic educational material will be distributed," the councils would also be authorized to receive and, when possible, deal with consumer complaints against profiteering on the part of local merchants. Complaints which could not be settled by the councils would be forwarded to the Bureau of Economic Education through the Department of Commerce district office for a given territory. By checking profiteering, the councils could be looked upon as aids in furthering the

³⁹ See address by Thomas C. Blaisdell, Jr., before American Statistical Association, December 29, 1934.

declared policy of the Administration to increase purchasing power.

But in view of the developing "obstructionist tactics" of the Consumers Advisory Board, the dangers to the immediate speed-up program of the N.R.A. inherent in the organization of what might develop into a consumer pressure group, were obvious. There were further delays. But Mrs. Rumsey was undaunted. On November 16, 1933, an N.R.A. release announced the appointment of Professor Paul H. Douglas, Professor of Economics at the University of Chicago, as chief of the Board's Bureau of Economic Education. Dr. Douglas was to undertake at once the tremendous job of setting up a consumers council in each of the counties. Each council was to consist of from five to seven members representing both urban and rural consumers. An attempt was to be made to include in the membership a housewife of moderate means, a "dirt farmer," the county agent, the home demonstration agent or an expert dietician, a manual worker, a member of a woman's organization actually interested in consumer problems, and a member of a cooperative or other consumers organization. The bases on which they were to be selected were "sympathy with the liberal purposes of the Administration, competence and energy, genuine concern and identification with the interests of consumers, and personal honor and integrity." Council members were to be voluntary workers, but it was understood that office space would be provided in federal buildings, with some office help, and the councils were to have franking privileges for their mail.

The chief functions of the councils as now outlined were to be: 1. To act as agencies for the consideration of consumers' complaints against undue price increases. 2. To serve as channels for the dissemination of accurate information concerning N.R.A. and its effects upon consumers. 3. To act as an agency through which consumers may become articulate on questions of national economic recovery. 4. To aid in the development of a more economical and efficient distribution of goods to

consumers. 5. To cooperate with the Federal Emergency Relief Administration and the Civil Works Administration to speed reemployment by the development of sound civic projects.

Dr. Douglas sought the cooperation of existing consumer groups and women's organizations, farm and labor groups, and university and educational leaders throughout the country, and with the help of Dr. W. T. Foster of the Pollak Foundation, and Miss Sue S. White, friend and personal assistant of Mrs. Rumsey, he set about his task. The energy displayed by Dr. Douglas however gave rise to further doubts in the minds of some N.R.A. officials as to the wisdom of the project, especially in view of his earlier activities in support of the Socialist Party. By mid-December it was still uncertain how far the plans would be allowed to develop.

At this time the whole question of consumer organization came under discussion between the C.A.B., the Consumers Counsel Office, A.A.A., and about 50 consumer leaders from different parts of the country at a two-day conference held in Washington, December 15-16 (1933). On the invitation of Mrs. Franklin D. Roosevelt, the Conference opened with a meeting at the White House under the chairmanship of Mrs. Rumsey.

The consumer cause seemed at the time at a low ebb. Late in October an executive order had announced that hearings would be held in mid-December on "unfair price" complaints that were now pouring in to the N.R.A. and particularly to the C.A.B. through its Complaints Bureau. But a few days before the scheduled date, the hearings were postponed by General Johnson "for lack of authenticated evidence of price rises."⁴⁰ Further, it had become known that as a result of a dispute in A.A.A. between Secretary Wallace and Administrator Peek,⁴¹ Peek was to be found a place elsewhere but at the price, exacted by the processors and other trade interests, of having a large number of codes under the jurisdiction of

40 N.R.A. Release No. 2140, December 8, 1933.

41 See below, p. 209 *passim*.

A.A.A. transferred to the more industry-minded N.R.A. It was under the goad of these circumstances that the Emergency Conference of Consumer Organizations had called upon the C.A.B. to fight for "real power" or resign. It was the question of how far consumer organization could be developed to increase the "real power" of the C.A.B. (and the Consumers Counsel Office, A.A.A.) that was uppermost in the minds of consumer leaders at the December conference. "In calling together this group of consultants we will have an opportunity to build contacts with those whom we represent," reads a joint statement prepared for the conference by Mrs. Rumsey and Dr. Howe, "and to develop channels whereby their needs may be known to us and our efforts in their behalf made known to them. We hope that this will be the first of a series of meetings on consumer problems." However, nothing much came of it.

During the sessions of the conference an attempt was made to set up a loose, informal national organization of consumers, taking in groups centered in Washington as well as those represented through the E.C.C.O. Preliminary plans were made for the Consumers National Conference (C.N.C.), and Mrs. Rumsey led a group of leaders active in setting it up, to see General Johnson. This was the occasion of the famous "shouting" interview, at which the General shouted at his visitors but, to his surprise, the chairman of the C.N.C., Dr. Leon Henderson, of the Russell Sage Foundation, shouted back. As an outcome, Henderson was appointed special assistant to Johnson on consumer problems. It was understood at the time that Schlink was also to be appointed, but that appointment did not come through.

But the C.N.C. had only a brief existence, a month or so, due mainly to lack of financing and persistent initiative. During that period, however, it issued a series of mimeographed releases in an attempt to "get around the 'hush policy' which keeps consumer protests in the 'bottle-neck' of the N.R.A. publicity agency controlled by Charles Michelson." These re-

leases give interesting sidelights on the general consumer position at the time.

Mrs. Rumsey now threw herself with renewed energy into the task of building up a consumer constituency through the proposed county consumers councils. It had become clear to her that a more congenial home would have to be found for the Bureau of Economic Education than the C.A.B. seemed to offer in view of the constant threat of muzzling control by the N.R.A. But what administrative home would be appropriate? Ideas had been developing during the period of delay, and supporters of the consumers council plan had talked over the possibility that the Bureau of Economic Education might become the nucleus of a permanent consumer agency in the federal government.

As pointed out above, the Industrial Advisory Board had the administrative support of the Department of Commerce, and the Labor Advisory Board of the Department of Labor. But there was no supporting department for the C.A.B. In November, 1933, Schlink had talked with members of the C.A.B. about a proposal for a new government department for consumers, and he had addressed an open letter to the President, dated November 20, urging that such a department be set up. This plan was endorsed by the E.C.C.O. in a letter to the President dated December 11, 1933, as a part of a program of broad economic consumer protection, "so that consumers in general may have a proper channel through which to voice their demands and from whom they may demand service, safeguards, research and publicity for consumers rights and needs, and skilled and informed opposition to interests that would invade those rights . . ."

During December, 1933, an intra-office memorandum from certain members of the staff to the Executive Director of C.A.B. drew attention to the fact that the Consumers Advisory Board had no right of direct contact with other agencies of the government outside N.R.A., and therefore could not, on its own motion, refer to the Federal Trade Commission or the

Department of Justice complaints which should be brought to their attention, "but must pass the decision as to how the consumer shall be protected to people whose main job is not to think about such matters." This intra-office memorandum urged the Executive Director to draw up a plan for a permanent consumer agency in the government outside the N.R.A., whose duty it would be, *inter alia*, to take cognizance of such matters; this plan should be sent to General Johnson with a request that it be forwarded to the President. Then "should the extreme issue develop which we have been fearing (abolition of the C.A.B.), we could act as advocates of what we thought a necessary step, rather than as people who had been hurt by not being sufficiently considered."

The idea of a federal department of the consumer was given further support by the C.A.B. proposal for a Consumer Standards Board. The Lynd Committee, as pointed out above, had proposed that this Board should be set up under the joint control of the Consumers Advisory Board and the Consumers Counsel Office, A.A.A., for lack of the more suitable administrative home which a permanent department would obviously afford. Later, Dr. Brady, after his appointment to the C.A.B. Standards Unit, worked enthusiastically for a consumer department.

And on January 26, 1934, members of the Board passed a formal resolution in favor of a federal department of the consumer, but agreed that the resolution should not be filed for release "until an appropriate time presented itself"—which was not until June 10, 1935.⁴²

There was not enough support among New Deal leaders to make the proposal for a consumer department practicable at the time, so Mrs. Rumsey explored the possibility of having the Bureau of Economic Education transferred to the National Emergency Council, as a Consumers Division of the Council. The National Emergency Council had been set up by the President in November, 1933, to coordinate the work of the various

⁴² See Appendix II.

emergency agencies of the New Deal, and Mrs. Rumsey had been named one of the original members of the Council as Adviser on Consumer Problems.

Some of the supporters of the proposal for a permanent consumer agency in the government opposed this suggestion as not being in the long-run interest of consumers. It was known that some of the members of the National Emergency Council were not sympathetic. Frank Walker, the N.E.C. Executive Director, was fearful of possible repercussions from local business and political interests and questioned whether the councils set up as government agencies would become critical of government policies. But Mrs. Rumsey could see no other solution if any nucleus for a permanent consumer agency were to be established at all, and she went ahead with the proposal. It was made known that Douglas was returning to Chicago University on April 1, and Walker, after checking some of the proposed membership lists already prepared for 3000 councils, was finally won over, not to the scheme as originally planned but to a trial experiment involving about 200 councils with strictly limited functions, over which he was to retain an effective veto. On March 20, (1934), the National Emergency Council formally authorized the establishment of a Consumers Division; and on April 7 an N.E.C. release announced that the Division had been set up.

About 150 councils were organized and serviced by the Consumers Division, N.E.C., and some of these councils were very helpful to the C.A.B. on specific issues, but, speaking generally, they did not provide an effective pressure group behind its work.

Much more important in strengthening the position of the C.A.B. in the N.R.A., was the support that developed for it unexpectedly in Congress.

C.A.B. Gains Congressional Support

The N.R.A. price hearings which were postponed in December, 1933, were held on January 9-10, 1934, partly as a result of representations made by the Consumers Advisory Board. It

was agreed by the N.R.A. executive officers that the Board should act essentially as counsel for the complainants, give a generalized presentation of the complaints sent in (most of which were from retailers), introduce witnesses, and so on. The Board arranged through the National Association of Purchasing Agents for a number of purchasing agents from different states, universities and municipalities to attend the hearings and give evidence on price movements and price policies under N.R.A. Further, the Price Section of the Board's staff under Dr. Corwin Edwards, had been working for some months preparing studies of general price movements in several of the important industries against which specific complaints were made, particularly in the paper, paper products, textiles, boots and shoes, steel, lumber, and bituminous coal industries—studies which indicated clearly that private price control leading to unfair price increases and price uniformity was extending under N.R.A.

The hearings, conducted by Division Administrator A. D. Whiteside, formerly of Dun and Bradstreet, Inc., was the first major inquiry into prices under the N.R.A. and attracted wide attention. This only served to increase the shock given the C.A.B. when it was learned, the day before the hearings, that, under the rules of procedure drawn up by the N.R.A. executive officers the Board would not be allowed to present the results of the studies it had made. Finally, after sharp objection, permission was given to present summary statements at the end of the sessions—to an empty hall! But the purchasing agents had some well-pointed stories to tell, and the press picked up some of the material from the special C.A.B. reports and gave it publicity—enough, at any rate, to attract the attention of Senator Gerald P. Nye.

On January 18, 1934, Senator Nye opened a Senate debate on the general subject of price and production policy under N.R.A.⁴³ He spoke from a position of friendliness to the generally accepted purposes of the National Industrial Recovery

⁴³ See Congressional Record, 73rd Congress, 2nd Session, pp. 866-871.

Act, but with a growing conviction that those purposes would be defeated by the program that was being developed by the National Recovery Administration. "The press did not, perhaps could not, indicate the true extent of the monopoly practices which these N.R.A. price hearings, developed by the C.A.B. under Executive order of the President, have disclosed," said the Senator. "I regard the disclosures of this hearing, available in over 1000 pages of testimony, as nothing short of startling." The evidence, he declared, revealed definite monopolistic trends, particularly: 1. Domination of small by large enterprises; 2. fixing of prices by the trade associations; 3. intimidation of hesitant members of the association; 4. fear of the small producers incurring the ill will of the large; 5. rapid rise of prices to the consumer, in many instances to a higher figure than those of 1929. "It is imperative," the Senator urged, "that every Member of the Senate and of the House peruse these reports. The issue is more than one of satisfying a legitimate interest in how a new and experimental law is working. It touches the very heart of recovery. Unless the conditions disclosed in these hearings are corrected I fear for the success of the entire recovery program . . . Unless the N.R.A. is prepared to correct these conditions quickly, a full and searching congressional study is necessary to determine possible amendments such as will cause the act to effectively serve the people and not the profit takers and monopolies."

The Senator then proceeded to summarize some of the facts disclosed in evidence and in the C.A.B. studies. He drew special attention to the evidence submitted by Mr. J. W. Nicholson, purchasing agent for the City of Milwaukee, with reference to coercion exercised by the General Electric Co., the dominating influence in the formulation and administration of the Electrical Manufacturers' Code. General Electric had forced a smaller firm which had secured a \$30,000 contract from the City of Milwaukee to cancel the contract. It did this by refusing to deliver to the smaller firm the necessary material to fulfill the contract, on the ground that the specifications set

by the city were not acceptable to the industry. As Senator Nye remarked, "A giant monopoly, General Electric, uses an N.R.A. code, which it was instrumental in writing, to further entrench itself in a program of compelling the public to take what they will sell, not what the public wants; a program of destroying whatever remains of competition in its own field." He also drew special attention to the C.A.B.'s comprehensive study of the paper industry, in which were reported price increases ranging from 25 to 150%, a uniformity of prices over a wide area, and discriminations against certain classes of trade while local dealers confessed themselves helpless in the hands of the supply houses. "It is hard to calculate," said the Senator, "how many millions of dollars the Nation, the several States, and the many municipalities have had to pay in excess of reasonable costs for materials as the results of matched bids and loss of discounts revealed at the price hearings . . . The difficulty it seems to me, lies in the fact that the N.R.A. as a representative of the government has not given the people the kind of representation that would protect the consumers' interests . . . There seems to have been more interest in how many codes per minute could be turned out than in what was in the codes . . . Profit seems to be the great watchword under N.R.A." Senator Borah subsequently took up the debate, in a discussion of the anti-trust laws in relation to the purposes and program of the N.R.A.

The debate focused considerable Congressional attention on the work of the Consumers Advisory Board, and improved the status of the Board in the N.R.A., as illustrated by an incident that arose over publicity for a C.A.B. memorandum on code revision. In preparation for a general inquiry into code policy which General Johnson had promised for the Spring of 1934, the C.A.B. staff prepared a well-considered memorandum on code revision, which was approved in detail by members of the Board and submitted to the General on February 19th. This memorandum, suggesting revision of the codes to bring them closer into line with C.A.B. policy, was submitted with a re-

quest that it be released to the press. The request was refused. The N.R.A. authorities hoped to present a united administrative front on the recovery program at the proposed conference, which was expected to bring thousands of people to Washington because of an aroused public opinion on price increases and non-compliance. But the C.A.B. took a vigorous stand on the issue, and again there were rumors of resignations. Dr. Leon Henderson used his influence with the General, who finally submitted the memorandum to the N.R.A. Research and Planning Division for an opinion, which proved to be favorable to public release of the memorandum. With the aroused Congressional interest in the N.R.A. program and in the work of the C.A.B., the time was not opportune for an open break, and the memorandum was therefore released to the press in time to make front-page headlines on March 5, the opening day of the Code Conference.

The effect of Congressional interest on the influence of the C.A.B. within the N.R.A. can, however, be easily exaggerated. It was intermittent in nature, and Congressional opinion was, generally speaking, dominated by Administration leadership which until the fall of 1934 supported General Johnson and the N.R.A. program as developed under him. By that time Congress was giving most attention to the need for revision of the Act itself.

The Advisory Council Strengthens the C.A.B.

A development that would probably have had a more important long-run effect on the real status of the C.A.B., had the N.R.A. been continued, resulted from the establishment in May, 1934, of the Advisory Council of the N.R.A., under circumstances which have been described above.⁴⁴ Through the county consumers council plan, the C.A.B. tried to build up a pressure group to support its position. The work of the Advisory Council tended to diminish the effect of pressure politics and so, indirectly, to increase the relative strength of the Board.

⁴⁴ See p. 31.

The atmosphere in which the Advisory Council worked, despite the general N.R.A. tempo, was helpful to the consumer cause. Around the table of the Advisory Council theoretical arguments could be presented for analysis and discussion, with the support of such factual material as was available. Dr. Walton Hamilton, one of the early members of the C.A.B.,⁴⁵ had become first chairman of the Advisory Council, and he was peculiarly fitted to elicit, analyze and reconcile different points of view. There was a tendency to minimize rather than to maximize differences. Representatives of industry and labor tended to take a broader point of view when confronted by the whole range of industrial policy than when they were concerned with the problems of one particular industry; and in this atmosphere created by the Advisory Council they were accordingly more ready to listen to the arguments of the consumer representatives, which, from the beginning, had been broadly based. And it must be remembered that the C.A.B., despite the weakness of its constituency, had equal voting strength with Industry and Labor in reaching Council decisions, a fact of particular importance in view of the pressure for unanimity.

In feeling its way "realistically" to a broad national economic policy, the Advisory Council found itself on most issues in close agreement with the position of the C.A.B. Only in a few cases did the Board consider it necessary to issue a minority report on Council decisions, though it occasionally modified its policy to reach agreement or, as the phrase was, "settled issues by negotiation." "The success of the C.A.B. in cases submitted to the Advisory Council has been conspicuous," Dr. Corwin Edwards reported to Board members on March 8, 1935. "A few days ago I went over the files of the Advisory Council decisions, selecting thirty-six cases in which the trade practice issues seemed to me to have been important. In those cases the C.A.B. won its point twenty-four times, sustained five defeats, and was forced to a compromise or inconclusive

⁴⁵ See above, p. 41.

decision seven times." The Board placed great importance on building up the influence of the Council in the N.R.A., and, in turn, the growing influence of the Board on Council recommendations improved the Board's status generally in N.R.A. But, as Dr. Edwards pointed out in his report, although a number of valuable principles were announced by the Council, very few changes in important codes were actually made as a result of Council decisions, because of the general atmosphere of delay in the later months of N.R.A., and the unwillingness of administrative officials to hasten drastic code revision.

The Problem of Code Revision

It would therefore be a mistake to conclude from the increasing prestige of the C.A.B. that its policy, either directly or indirectly through the Council, came to have any considerable influence over the provisions of the codes, *i.e.*, over the actual regulation of industry under N.R.A. The declared position of the National Recovery Administration came to be modified but this affected only (1) new codes, a matter of little importance, since after the first few months of N.R.A. most of industry was under code, and (2) revised codes and, as just remarked, very little revision of important code provisions was carried through before the National Industrial Recovery Act was invalidated by the Supreme Court in May, 1935.

The importance of the official shift in policy by the National Recovery Administration should not, of course, be unduly minimized, and there is no doubt that the work of the Board had some influence on it. For example, following the N.R.A. price hearings of January, 1934, and the subsequent Senate debate, General Johnson had appointed Dr. Leverett Lyon of Brookings Institution to be a special deputy administrator to advise on price policy for the N.R.A. Recommendations subsequently made to the Administrator formed the basis of the famous N.R.A. price policy memorandum No. 228, issued on June 7, 1934. This began "an orderly retreat from price-fixing" as an expression of N.R.A. policy, which was thus

brought closer into line with the consumer policy developed by the C.A.B., as outlined below in Chapter II. And this change was approved and even extended by the National Industrial Recovery Board when it succeeded General Johnson as administrator of the N.R.A. in October, 1934.

But during the second year of N.R.A., the C.A.B. spent much of its effort unavailingly in an attempt to get existing codes revised in line with this new trend in Administration policy. At the price hearings of January, 1935, Dr. Keezer reported: "Before the order of June 7 last year, approximately 430 codes which contained price provisions in conflict with it had been approved. There have been of course certain stays of different types which did not give the price-fixing provisions of those 430 codes full effect; but the record shows only about 12 of the 430 have been modified to bring them into conformity with the order."⁴⁶

The right of the C.A.B. to initiate revision was not officially recognized until near the end of the N.R.A. experiment, though it was the subject of frequent discussion for many months. In an intra-office memorandum to the C.A.B. chief of staff on May 25, 1934, a number of staff members of the Board had argued that the main task now before the C.A.B. was to secure revision of codes containing provisions adverse to the consumer interest. They asked: "If the right exists, has not its exercise become a duty? If it is doubtful, should not the Board move without delay to have the issue determined?" In their opinion the Board should assume the right and make proposals for the modification of specific codes. The memorandum continued:

We are of course aware that advice in this form might not be palatable; but concern over this possibility seems to us less important than consideration of the question whether the advice would be salutary and whether the Consumers Advisory Board is wholly General Johnson's creature. . . . Since (the Board) finds its charter in the words of the President rather than of the Admin-

⁴⁶ N.R.A. Hearings, Senate Committee on Finance, 74th Congress, 1st Session, p. 601.

istrator, can it not on this basis justify the taking of a more independent position than its enemies might wish to see it enjoy? All of us have been puzzled at times by the Board's reception of slights, verbal spankings, scornful disregard, and insults. . . . It is understood, however, that conciliatory tactics have been considered wisest. . . . Admitting that this strategy has been productive of some victories, and that in certain circumstances with certain persons it will doubtless be effective in the future, we nevertheless believe that a more uncompromising position should have been taken on a number of past occasions than, to the best of our knowledge was taken. . . . We do not believe that the National Recovery Administration desires at this time to become involved in public controversy with the Board, and for some of its unpaid members to give out interviews . . . would involve at least no economic risk.

On October 25, 1934, Dr. Blaisdell, then Executive Director of the C.A.B., brought the question of revision up before members of the Board. He proposed that a statement should be sent to the National Industrial Recovery Board and also to the Labor Advisory Board and the Industrial Advisory Board to the effect that the time was ripe "to accelerate the re-examination and modification in the light of experience, of those provisions in the codes which have to do with price control and production control." The necessary revisions could be made only case by case, he suggested, "in relation to the specific conditions of those major codes which cover the larger part of business activity." This was in line with a recommendation of the Advisory Council on July 19, 1934, against any attempt to revise codes by a blanket executive order.⁴⁷

But the N.R.A. authorities were unwilling to take the initiative even in individual code revision, except on evidence of serious abuse or administrative breakdown. At the beginning of the N.R.A. experiment General Johnson had taken the position that the thing to do was to get the codes written and

⁴⁷ See A. C. Decision No. 7, 1934, p. 4.

in operation, and then to take up the question of revision. But now any suggestion for revision was characterized as a breach of faith. The code had become a vested interest. In an illuminating report to members of the C.A.B. in March, 1935, Dr. Edwards explained the difficulties met with by the executive staff in their efforts to apply the principles of Memorandum 228⁴⁸ and subsequent policy statements by N.R.A. "The Industrial Advisory Board and a considerable part of the administrative organization," he reported, "look upon the codes as an agreement which it would be a breach of faith to modify without impressive evidence of abuse and failure. There has been no consistent willingness to accept the development of N.R.A. policy itself as a circumstance sufficient to justify a change in these codes."

The fact that some codes were operating under the new policy but most under the old, caused considerable confusion, both in N.R.A. and in industry. On November 5, 1934, the Advisory Council objected to a proposed "Blue Eagle" drive, on the ground that the N.R.A. "cannot attempt to unsell the public on its conception of N.R.A. as fundamentally a price-fixing and competition-suppressing agency, without at the same time implying to business that an extensive scaling down of old codes is in prospect"⁴⁹—an implication that the National Industrial Recovery Board considered inexpedient. The N.I.R.B. was accordingly slow in finding a way out of the confusion. This was partly because much time was taken up by problems of administrative machinery and jurisdiction. But from December, 1934, onwards there was a tendency in the N.I.R.B. to postpone all postponable issues, especially after Congress began the consideration of amending legislation. "It appears probable that until the new act has been passed, no code changes may be expected except in particular codes as a result of abuses and difficulties," Dr. Edwards reported to mem-

⁴⁸ See above, p. 76.

⁴⁹ A. C. Decision No. 77, 1934, p. 69.

bers of the C.A.B. in March, 1935. The Advisory Council had already suggested that for the next few months the basic emphasis in the day-by-day activity of the N.R.A. organization should be shifted to the observation and analysis of the operation of the codes.

That, in fact, was what the C.A.B. was already doing. On January 5, 1935, the Board submitted to the N.I.R.B. a general statement on a basic revision of the National Industrial Recovery Act.⁵⁰ From this time on most of the energies of the C.A.B. were taken up in arguing for the consumer point of view, as it saw it, at public hearings on specific or general questions of policy: the N.R.A. price hearings of January, 1935, the employment hearings of February, the hearings on functional differentials in March, and especially at the general hearings held by the Senate Finance Committee on the N.R.A. in March-April.

It was during testimony at the latter hearings that Senator Clark remarked: "I am in no sense criticizing the work of the C.A.B. I think it is the most commendable work that has been done in connection with the whole N.R.A., and my objection lies in the fact that the consumer's interest as represented by the C.A.B. has not been given greater weight in the determination of the policies of N.R.A. I think in saying that I express the views of a number of other members of this Committee."⁵¹

But the work of the C.A.B. was finished. On May 27, 1935, the Schechter decision brought the N.R.A. experiment to an end. Was nothing permanent to be saved of the consumer representative function in industrial regulation? On June 10, as a last gesture, the C.A.B. released to the press its resolution of January, 1934, advocating a permanent department of the consumer.⁵²

⁵⁰ See Appendix I.

⁵¹ *Op. cit.*, p. 673.

⁵² See Appendix II.

THE CONSUMERS DIVISION, N.R.A.

The function of consumer representation in general industrial regulation did not, however, come to an end immediately. On July 30, 1935, by Executive Order, a Consumers Division was set up within the truncated National Recovery Administration to combine the functions of the C.A.B., the Consumers Division of the N.E.C., and the Cabinet Committee on Price Policy.

As outlined above,⁵³ the Consumers Division, N.E.C., had been set up at the urgent insistence of Mrs. Rumsey to promote and service the county consumers councils and as a possible nucleus for a permanent consumer agency in the government. But the Division was throughout its existence hampered by official neglect and inadequate funds, and after Mrs. Rumsey's death, it had no friend on the N.E.C. interested enough to fight for appropriations to expand or even to continue its work.

This work, as it had been built up during 1934, included continuous contacts with the county consumers councils of which about 150 had been set up and about 100 were active. Generally, the councils, in the exercise of the limited functions which they were authorized to undertake, were expected to make more effective the work of the C.A.B. and the Consumers Counsel, A.A.A., which had been established "in pursuance of the conviction that there are three parties with vital interests in the conduct of American industry—employers, workers and consumers; that all of these parties should have an effective voice in the execution of legislation affecting them; and that their legitimate grievances under this legislation should be promptly heard and adjusted."⁵⁴ Some of the Councils did in fact afford valuable assistance to the work of the C.A.B.

In addition to its work with the councils, the Consumers Division was authorized to coordinate and develop the price work of the consumer agencies and to this end a Fair Price

⁵³ See p. 70.

⁵⁴ See Consumers Division, N.E.C. Bulletin No. 1, p. 2.

Section was set up, which cooperated with the Cabinet Committee on Price Policy.

The Division issued a series of *Notes and Suggestions*, later developed as *Consumer Notes*, which, though it never became the consumer organ for which Mrs. Rumsey had hoped, did publicize, as part of a broad consumer program, the work that was being done by the various agencies performing consumer services in Washington, including the Bureau of Home Economics, the Bureau of Agricultural Economics, the Food and Drug Administration, and the U. S. Public Health Service. In fact, probably the most important aspects of the Division's work were the closer working relationships developed between the C.A.B. and the Consumers Counsel Office, A.A.A., and to some extent the other agencies in the government serving the consumer, and also the popularizing of the work of these agencies through its service bulletins to the consumers councils.

Despite this record of service, however, it soon became clear after Mrs. Rumsey's death that there would be no further authorization of funds for the support of the Division after June, 1935. In March, Miss Sue S. White, Associate Director of the Division, who felt a great responsibility in protecting this offspring of Mrs. Rumsey's activity, sent a private appeal for help to the C.A.B.: "If you are interested in preserving something of what you have helped to build during the past two years," she wrote, "it may possibly be done by fostering the plans for a permanent consumer agency." She suggested that a possible set-up for a consumer agency, to function independently of emergency administrations, would be a Board of three Cabinet members (including the Secretaries of Labor, Agriculture, and Commerce) with a permanent administrative officer to carry on the functions of the agency.

The C.A.B., however, could give no effective help, since its own existence was a matter of great uncertainty pending revision of the National Industrial Recovery Act. When the whole N.R.A. structure began to disintegrate, following the Schechter decision, members of the C.A.B. became more vitally

interested in the proposal for a permanent department of the consumer, and, as pointed out above, the Board released its resolution of January, 1934, in favor of such a department. But this new drive for a consumer department was also unsuccessful. The final outcome was the new Consumers Division set up under the reorganized N.R.A. which was to be liquidated at the end of the year.

This decision caused much anxiety among some consumer leaders who argued that there could be no adequate functioning of an agency set up on such an insecure and limited basis.⁵⁵

The situation, from the consumer point of view, did not, however, seem hopeless. The Executive Order of July 30, 1935, which had set up the new Consumers Division, had named as its Director Dr. Walton Hamilton who had served for a time as a member of the National Industrial Recovery Board, after being Chairman of the Advisory Council, N.R.A. It had also named him as Adviser to the President on Consumer Problems, an office which had lapsed since Mrs. Rumsey's death, so that although the Division was placed for administrative purposes under the N.R.A., its Director had access to the President. He was also empowered to set up an advisory committee for consultative purposes.

The functions of the new Division as set out in the Executive Order were broad: "to stimulate interest in the problems of the consumer, to review public policy in so far as it relates to the consumer, and in general to suggest ways and means to promote larger and more economical production of useful goods and facilitate the maintenance and betterment of the American standard of living. The Director of the Consumers' Division shall further define objectives, plan a program of activities including research and the dissemination of information, choose technical and administrative staff, and subject to the approval of the Administrator of the National Recovery Administration,

⁵⁵ See *e. g.* statement by Sue S. White in *National Consumer News*, August 25, 1935.

supervise the activities of the Division." The Director was also to supervise the work of the County Consumers Councils.

Was it possible for the new Division with these broad powers, to create sufficient interest and support for a consumer program to lay the foundation for a permanent consumer agency in the Government? The subsequent history of the Division was one of gradual loss of prestige and of slow disintegration until the last unit of it disappeared in June, 1938.

Dr. Hamilton's appointment proved to be unfortunate, from the consumer point of view. Under his chairmanship the Advisory Council, N.R.A., had endeavored to resolve conflicts between different economic interests into a broad national policy. And this perhaps was the main difficulty in his new position. For he had ceased to be promotional of the consumer interest as such, and now began to reverse Mrs. Rumsey's policy of organizing that interest in order to secure its recognition. "We are not a pressure group,"⁵⁶ he declared on taking office. He appointed an Advisory Committee to help him with their individual and group advice, but this Committee does not seem to have been given any opportunity to function.

As Dr. Hamilton saw it, his main contribution was to be through a program of price studies, particularly in some essential commodities — coal, milk, paper, gasoline, shoes, women's dresses, ice, movies, textiles. The object was not only to find what prices are, but why they are what they are. This involved an examination of the industrial and financial structure in each of the selected industries in order to determine what keeps an abundant supply of their products out of the reach of the people. This was no inquiry for inquiry's sake. The knowledge obtained through these studies was to form the basis of intelligent consumer opinion and action.⁵⁷ "In material wealth, human resources and technologies the raw materials of a state of welfare are all here. An effort of the

⁵⁶ Statement by Walton H. Hamilton, July 30, 1935.

⁵⁷ See Press Release, September 9, 1935, Consumers Division N.R.A.

people based upon understanding can quicken potential resources into a truly American standard of living," Dr. Hamilton declared. It was a large task and absorbed all his energies and the energies of most of his staff, and nobody else cared about it.

Meanwhile, the staff taken over from the Consumers Division, N.E.C. was carrying on its work with the County Consumers Councils. The mimeographed *Consumer Notes* was expanded in printed form as *The Consumer*, planned as a bi-weekly publication for use not only by the councils but also by the general public. A Bulletin entitled "General Information and Instruction Manual for County Consumers Councils," which appeared in October, 1935, gives an interesting summary of the functions of the councils as then understood by the Division. The councils, in short, had two roles: As agents of the Division their program was solely of an educational character—collecting and disseminating factual data relevant to the consumer interest, and acting as a two-way channel for this information down to the individual consumer and up to the Division. In this role, they enjoyed the franking privilege for their mail. But the councils had another and non-official capacity, and when acting in this capacity, they were not subject to such restraints. "In their unofficial capacity (as groups of interested citizens) and of their own volition, the County Councils may carry on a wide variety of constructive activities in behalf of the Consumer," declares the Instruction Manual. "For instance, in their unofficial capacity the Consumers might initiate legislation; take steps in opposition to an arbitrarily high level of commodity prices; sponsor Consumers Cooperatives, propose action to be taken based on the results of factual surveys" and so on. "The Councils alone will be responsible for the non-governmental activities, yet this responsibility should not unjustifiably curb those activities. Such a result would seriously curtail the total potential usefulness and service of the County Councils."

But any proposal for trying to extend the Consumers Council system or even for stimulating the work of existing councils, met with little sympathy from the Director. Part of this attitude, however, probably resulted from a lack of administrative capacity to keep different parts of an organization functioning harmoniously, and a lack of power to release his mind from the pressure of his more congenial research work.

Sue White resigned. She could not endure the crumbling of Mrs. Rumsey's monument. The Consumers Division continued to service the surviving councils, but they had lost much of their significance as part of a system of consumer representation in the government because the representative function itself was not being actively exercised. The Division was now primarily a research organization, and as such had lost its uniqueness and impetus. This does not of course detract from the value of much of the research work done.⁵⁸ But the broad objectives were gone. The Division no longer represented a point of view.

At the end of 1935, with the final liquidation of N.R.A., the Consumers Division, if it was to be continued in any form, had to be attached to some department or other administrative set-up, and there was no obvious solution for this problem. Finally, it was transferred by Executive Order of December 21, 1935, to the Department of Labor. But there were no funds available in the Department of Labor for its support, and in February it went on relief as a Consumers Project attached administratively to the Department of Labor but financed by W.P.A. About the same time Dr. Hamilton was transferred to the Social Security Board, and Dr. Clarence E. Ayres became Director of the Consumers Project. Dr. Ayres, Professor of Economics at the University of Texas, was interested in the price studies begun by Dr. Hamilton, and continued them. But he was convinced that functional representation of economic

⁵⁸ The price studies were later released for private publication and some of them were published as *Price and Price Policies*, by Walton Hamilton and Associates, 1938.

interests—Industry, Labor, Consumer—was a regrettable trend in American administration and would lead to “fascism.” The Consumers Project cannot in any sense be regarded as a “representative” agency. Indeed in the leisurely, quiescent offices of the Consumers Project it became difficult even to recall the strenuous, enthusiastic hammering out of consumer policy by the Consumers Advisory Board.

The Consumers Project had no authority to set up or to maintain the county consumers council system. The councils lost the franking privilege, and the other governmental aids which had been extended to them. They had to continue, if at all, as unofficial consumer groups. A few did so, but the vitality of most of the remaining councils was not strong enough to survive the loss of privilege. The Consumers Project, which still included some members of the staff of the former Consumers Division, N.E.C., suggested to the consuming public that consumer institutes, on a broader base than the councils, might be set up; and two bulletins—“Organization Outline for Consumer Institutes,” and “Handbook for Consumer Institutes”—were prepared and distributed.

Meanwhile the Project had been trying to secure the approval of the Bureau of the Budget for the continuation of *The Consumer*, which had been suspended when the Division was transferred to the Department of Labor. The Director of the Budget had ruled that funds from W.P.A. for the Consumers Project did not cover publication of a periodical, and continued efforts to reverse this decision were unsuccessful. The Director of the Project denied current rumors to the effect that the publication had in fact been squelched by Department of Labor officials, and maintained that the issue was entirely one with the Bureau of the Budget.

Dr. Ayres soon afterwards resigned and on November 1, 1936, was succeeded by his assistant, Dr. Thomas Holland. The research work of the Project was now partly in the field of consumer cooperatives, and more particularly in the field

of consumer standards, under the direction of a technical expert, Dr. Kaidanovsky.

During 1937 it was hoped by consumer leaders that the Administration proposal for the establishment of a department of "Public Welfare" would become law. Such a department seemed to offer the possibility of a "neutral" home for a consumer agency, particularly since the President's Committee on Reorganization had recommended that one of the functions of the proposed department should be the protection of the consumer. This hope was destroyed by the defeat of the first Reorganization bill⁵⁹ and, in the summer of 1937, most of the staff of the Consumers Project were taken over by another W.P.A. project. In June, 1938, the Standards Unit, which had been kept together, was transferred to the supervision of the Consumers Counsel, A.A.A.

THE CONSUMERS COUNSEL, NATIONAL BITUMINOUS COAL ACT

Meanwhile, however, the idea of consumer representation in industrial regulation had been embodied in special legislation for the bituminous coal industry, following the invalidation of the National Industrial Recovery Act.

Under the N.R.A. a state of emergency had been declared for the bituminous coal industry, and prices had been fixed in a number of areas on a basis and at a level which the Consumers Advisory Board believed to be against the consumer interest. The C.A.B. was finally convinced that price-fixing was no solution of the problems of an industry which required fundamental rehabilitation and had suggested instead some form of production control under adequate government supervision with all interests represented. But the miners supported the N.R.A. coal code as an instrument for stabilizing the industry, and increasing their annual income, which had been unconscionably low. Under the N.R.A. code, the relations of

⁵⁹ The Reorganization bill that did become law in 1939 left out the earlier statutory provision for a Department of Welfare.

labor and management were better than they had been for a long period.

After the Schechter decision, a powerful drive by the United Mine Workers Union to protect the labor standards established under the code helped to secure the passage of the Bituminous Coal Conservation Act, 1935. It was said that most of the small producers favored legislation for a little N.R.A. for coal, though some of the larger ones were opposed. At the time there were about 8000 bituminous mines in operation scattered through a number of states. These mines employed nearly half a million workers whose labor cost constituted a high percentage of the total costs of production.

The 1935 Act was declared unconstitutional in May, 1936, largely because of its provisions for labor standards in the coal industry. A substitute Act passed in 1937 was, in the main, supported by the same interests that helped to pass the original act, though the labor provisions were omitted.

Under the National Bituminous Coal Act, 1937, a National Bituminous Coal Commission was established to carry out the provisions of the act. The Commission was to be constituted of 7 members appointed for a four-year term by the President with the consent of the Senate; none of these members was to have present financial interest in the industry, but two must have had previous experience as miners and two as producers—presumably the other three were to represent the “public.” Twenty-three producing districts were to be set up with a district committee or board in each; the members of the district boards were to represent cooperating producers with one representative from the miners. A code was to be formulated for the industry, acceptance of which was to be voluntary but with the powerful inducement of what was in effect a penalty tax on non-cooperators.

The main instrument of control was to be a highly complicated system of price-fixing. The Commission was asked to investigate a number of questions as soon as reasonably possible, including production control, costs of distribution and

some other matters, but their immediate responsibility was to determine and promulgate a schedule of prices f.o.b. the mines. They were authorized to fix a wholesale discount to be deducted from this price, but they were given no authority over retail prices as such.

The process of price-fixing in the coal industry as provided for in the act was one of enormous difficulty. A statistical bureau of the Coal Commission was set up in each district, to assemble the producing costs for each mine in its district; the cost items to be included in these compilations were set forth in the Act. These figures were then to be taken by the industry-controlled District Boards as a basis for determining the weighted average costs for the districts as grouped into 10 minimum price areas. But when this cost basis for price was determined, then a second principle came into operation, namely that all producers must have a fair opportunity to compete in existing markets. That is to say, when coal from one producing district competed with coal from another district, the prices for these two coals must bear a competitive relationship to each other. Prices as based on costs in different producing districts had therefore to be "coordinated" for different marketing areas. Average costs thus became a floor below prices rather than the final price determinant. District boards were to arrive finally by negotiation and compromise at a suggested schedule of prices which they were to submit to the Coal Commission for approval as a minimum price schedule. If the boards could not reach an agreement, the Commission itself had to undertake the responsibility. In arriving at a final determination the Commission of course had to bear in mind not only competitive relationships between different producing districts, but also active competition in the market from other coals and fuels. The schedule of prices as finally written out was to give the fixed price for each size and quality of coal at each individual mine.

It was in this extraordinarily complicated price-making process, that the consumer interest was to be brought to bear

through the Office of the Consumers Counsel, which was provided for in the Bituminous Coal Conservation Act, 1935, and continued in the substitute act of 1937. The Consumers Counsel Office was thus unique among the New Deal consumer agencies in that it had definite legal status, with authority derived from Congress.

It is interesting to note that the functions of the Consumers Counsel, N.B.C.C., were very similar to those proposed for the Consumers Counsel of the Tariff Commission in the tariff bills of 1929 and 1932.

The Consumers Counsel was to be appointed by the President with the consent of the Senate as were members of the Commission, but no term was fixed to his appointment. He was to receive the same salary as a member of the Commission and an independent appropriation for his Office. The 1937 act required him to report direct to Congress. The Consumers Counsel Office, like the Coal Commission itself, was placed administratively within the Department of the Interior.

The Consumers Counsel was required to appear "in the interest of" the consuming public in all proceedings of the Commission, and he was also required to carry on such independent investigations of matters relative to the bituminous coal industry as he deemed necessary "to enable him properly to represent the consuming public" in any proceeding before the Commission. Whenever he considered it in the interest of the consuming public to have the Commission furnish any information at its command or make any investigation, the Commission was "promptly" to do so. He might also require the Commission to summon witnesses to testify in its proceedings and to have subpoena issue in his behalf. But he was given no responsibility for the decisions of the Commission, nor any voting power in any of the Commission's proceedings.

During the debate on the Consumers Counsel amendment to the tariff bill of 1929, Senator George had made it clear that in asking for the appointment of a Consumers Counsel he had in mind the interests of the "ultimate consumer," not the

"industrial consumer."⁶⁰ But no indication was given by Congress as to the meaning of "consumer" for the purposes of the bituminous coal act. From the first, however, the Consumers Counsel took the position, which does not seem to have been questioned, that he was to represent all buying interests, including the ultimate consumers, who take only about 18% to 20% of the total production. This interpretation of "consumer" as the buyer at all stages of the industrial process may have been partly due to the fact that the Commission is primarily concerned with establishing a mine price, and it seems hard to secure recognition of the fact that the ultimate consumer who buys at retail, is directly interested in costs at each stage of the industrial process. Moreover, the act provides that in making complaints after prices are established, parties at interest before the Commission are code members, district committees and committee members, states and political subdivisions, and the Consumers Counsel. Under this provision, if the Consumers Counsel had interpreted his function as representing only the ultimate consumers, the large buying interests such as railroads, utilities, manufacturers and so on, would be left without status as complainants before the Commission.

The first Consumers Counsel, Thomas M. Woodward, was appointed October 1935, but no appropriation was made for his Office until January 1936, and the subsequent uncertainty as to the constitutionality of the original act and the delay in passing the substitute act gave him no adequate opportunity to develop a consumer program.

He was succeeded by John Carson, formerly a Washington correspondent and secretary for many years to Senator James Couzens of Michigan. Carson retained his position until it was abolished at the same time the Coal Commission itself was abolished, under the Reorganization Act of 1939. The functions of the Consumers Counsel Office were then vested in a

⁶⁰ Congressional Record, Vol. 71, Part 4; 71st Congress, 1st Session, p. 4616.

Consumers Counsel Division in the Office of the Solicitor, Department of the Interior.

PRICE-FIXING PROCEDURE

In trying to follow the consumer policy developed by Carson and his assistants, it must be understood that he had to function within the framework of the bituminous coal act. As an official appointed under the act he had a duty to assist in its effective administration. He could not therefore oppose price-fixing, nor the basis on which prices were to be fixed in so far as it was written out in the act, though he might recommend changes in his report to Congress—and he did in fact take advantage of this opportunity in his annual report to Congress for the year July 1937 to June 1938, when he suggested that more importance might well be placed on the section of the act providing for the setting up of marketing agencies under special safeguards.

In the administration of the act, therefore, consumer policy had to be based on the acceptance of a fixed price objective. But Carson insisted that the Coal Commission in working out its procedure should give him full access to all cost data on which the price schedule was based and that all interests should have an opportunity to be heard at public hearings before the schedule was adopted.

In making these demands, he soon found himself in sharp conflict with the Coal Commission under the chairmanship of Charles Hosford, a former coal producer, who was determined to go ahead and fix prices as soon as possible. The miners also, it should be remembered, were anxious to get the act into effective operation. The Commission refused to give the Consumers Counsel access to data within its possession. Carson, who had reason to believe that such data as was available was scrappy, and at best unstandardized and therefore inadequate, persisted in his demand. He maintained that without the basic data he was not in a position to protect the consumer interest. But he was unsuccessful in these efforts.

Then on November 30, 1937, the Commission published a schedule of prices for certain districts to become effective December 16, despite the fact that no public hearings had been held on the proposed schedule, though a promise that such hearings would be held was given the Consumers Counsel privately September 25, and confirmed publicly by the Commission a few days later, September 28. The publication of the schedule led to a storm of protest from buying groups.

On December 9, a conference of coal consumers held in Washington at the call of the Consumers Counsel, considered the whole situation. The Counsel had already on December 4 petitioned the Commission, making a number of complaints, and asking for a public hearing at which the Commission should adduce evidence to show that the prices established conformed to the requirements of the act. Many members of the consumers conference urged that the price schedule should be suspended. They thought the Consumers Counsel should take more vigorous action to protest the failure of the Commission to hold hearings, and should seek legal redress.

Carson, as he explained to the conference, was in a difficult position. "We recognize," he said, "that Congress intended we should have the task of representing your interests before the Commission. But we recognize also that we are, in fact, Consumers Counsel to the Commission itself."⁶¹ He had been in contact with the secretary of the Commission, and reported to the conference that the Commission had agreed to hold hearings later in the month when it would make data available substantiating the schedule; he advised that no protest action be taken in the meantime.

His position was, therefore, very embarrassing, when at the opening of the hearings, December 21, the Commission ordered him to proceed with his complaints, without attempting to make available to him any evidence on which such complaints might be based under the act. He refused to proceed under these

⁶¹ See *The Consumer Speaks* by Consumers Counsel, N.B.C.C., 1938, p. 9.

circumstances and thereupon determined to seek legal redress. After some delay, he secured the consent of the Attorney-General to present the consumers case in court through an attorney of the Consumers Counsel Office.⁶² Meanwhile legal action had been taken both by some coal producers and by some large industrial users to restrain the enforcement of the schedule. The outcome of this whole situation was that the schedule of prices was revoked by the Commission, February 25, 1938. Increasing friction within the Commission itself ended in the resignation of Charles Hosford as chairman and the appointment in his place of Percy Tetlow, a representative of the miners. The Commission then proceeded to a re-determination of prices.

The reorganization of the Coal Commission was of considerable significance to the Consumers Counsel since the new chairman was ready to cooperate with him, admit him to conferences of the Commission and give him access to data in the Commission's files. The conflict over access to data then ceased to be one between the Commission and the Counsel and became one between the producers and the Commission. The Commission was prepared not only to make the data available to the Consumers Counsel but also to the public, and the producers instituted court action to prevent this. In a decision in the case of the Utah Fuel Company, the U. S. Supreme Court, in February 1939, upheld the Commission's proposal to permit inspection by interested parties of individual cost data. The Consumers Counsel associated himself with the Commission in this case, by filing a brief in the lower Court, in which he claimed "that only by full and fair disclosure of all facts, including verified cost reports of individual producers can the public be adequately protected and public confidence be attained."⁶³

⁶² For an official summary of this whole episode see *Annual Report of the Consumers Counsel for the Fiscal Year, 1937-1938*.

⁶³ See *Coal Consumers' Digest*, Vol. II, No. 1, February 6, 1939, p. 3 (published by Consumers Counsel, N.B.C.C.).

The Consumers Counsel might have further delayed the determination of a price schedule by insisting that an adequate cost system should first be developed for the industry, costs assembled on that basis and books and records audited—a matter of years. He took the position, however, that it was his duty so far as was compatible with his functions as a consumer representative to assist in getting the act into effective operation as soon as possible. He agreed therefore to accept such costs as were available, on sworn affidavits, as a satisfactory basis for price determination, providing he could make a spot check of them and providing the Commission undertook to set up a standard cost system and began an audit of books and records. In taking this position Carson was influenced by the thought that competition within the industry and between other coals and fuels is itself some protection against an unduly high level of fixed prices. He was influenced also by the consideration that unrestricted competition in price leads to a production technique anti-social in its consequences, since the tendency to take only the cheaply available coals from the mine, increases.⁶⁴

The Coal Commission then decided to hold a series of regional hearings on costs, preparatory to a re-determination of prices. In connection with these hearings, the Consumers Counsel not only presented critical testimony on his own behalf (particularly on selling costs) but also tried to secure an expression of unofficial consumer opinion. Individual consumers have no statutory right to appear in proceedings before the Coal Commission, and a situation might have arisen in which consumer opinion before or after the publication of minimum prices would have had to be channeled through the Consumers Counsel Office. However, Carson arranged with the Commission to allow individual appearances, and he invited consumers, whether industrial or domestic, who wished to attend hearings to get in touch with his Office. He undertook to forward statements or help arrange for personal appearances at hearings

⁶⁴ See *Annual Report of the Consumers Counsel for the Fiscal Year, 1937-1938*, p. 8.

whether or not he agreed with the opinions of the individual consumer.

The Consumers Counsel does not appear to have been subject to any administrative restrictions in his efforts to arouse consumer interest. Through a little news card, the *Coal Consumers Digest*, he tried to interest domestic consumers in the Commission's proceedings, and he arranged pre-hearing conferences at which the services of his staff were made available to anyone wishing to testify.

The response from domestic consumers was, however, very slight. The fixing of coal prices, though admittedly important, is a highly complicated and technical subject, and there are other matters easier to understand which claim consumer attention. Moreover on any issue it is difficult to get consumers to make a public appearance in their own interest. But this does not seem altogether to explain their failure to take an interest in price-fixing for the coal industry.

One point worth consideration in this connection is the fact that Carson was practically unknown to consumer groups at the time of his appointment and he did not go out among consumer leaders to select his staff. Perhaps some significance should also be attached to a vague feeling in consumer groups that the Consumers Counsel was interested primarily in the position of the large industrial buyers, and that he might find himself embarrassed if the interests of the industrial and domestic consumers became markedly divergent.

With reference to this latter issue it should be pointed out that coal is bought by sizes as well as quality, the small size as a rule being taken by the industrial buyers and the large size by the domestic consumers, though domestic consumers including apartment houses are becoming more interested in small coal. It is of course to the immediate interest of the big buyers to secure as low a price as possible for small coals, even though this tends to widen the spread between prices for small and large coals. There are many problems involved in this situation, but it is obviously to the interest of the domestic consumer to

be in as strong a bargaining position as possible when the question of proper spreads in price between different sizes and classifications of coal is under consideration. At the Coal Consumers Conference, December 1937, Mr. E. B. Gordon, a representative of the Consumers Counsel staff said: "We felt that all interests would be served best if the spread between the industrial sizes and the higher-priced sizes for domestic consumers were not as great as it has been at some times in the past. That is as far as we can go, and we would like very much to have free expression of opinion on your feeling as to the price relationship that would best serve all interests with respect to the different sizes of coal and particularly the smaller sizes as compared with the larger sizes."⁶⁵

Carson himself maintained that the extent of the difficulty in representing divergent consumer interests depends on the common sense of the Consumers Counsel. The question, however, brings up the issue of who is the consumer for purposes of consumer representation in the regulatory process.

QUALITY STANDARDS FOR COAL

In addition to his activity in connection with the price-making process, Carson tried to promote the development of quality standards for coal. Analyses of coal to determine its quality, that is its "heat value," are made at the mines for each type or class of coal, but in the main these analyses have not been worked out according to any generally accepted standards though a move is now being made in that direction. Carson gave a considerable amount of attention to problems involved in getting standardized analyses into general use.

In October 1937 he made formal recommendations to the Coal Commission for the adoption of a non-technical uniform description of bituminous coals to protect consumers from misrepresentation and enable them to know exactly what type of coal they are buying. Details of the plan were made public by the Consumers Counsel Office in a booklet entitled *How Much*

⁶⁵ See *The Consumer Speaks* by Consumers' Counsel, N.B.C.C., 1938, p. 20.

Heat. A summary release accompanying the booklet declared that evidence presented at hearings conducted by the Coal Commission in July 1937 on classification of coals indicated that there was "a deplorable lack of uniformity in describing the bituminous coal in such a manner that purchasers can have advance knowledge on probable burning characteristics . . . when consumers buy coal, they are in effect buying 'heat,' but while two lumps of coal may look exactly alike to the consumer, may be the same size, shape and weight, they may have totally different values in terms of heat."

Under the fair trade section of the bituminous coal act the intentional misrepresentation of any analysis constitutes an unfair trade practice and subjects the producer who indulges in it to the penalties provided by the act. The main problem, however, is not one of misrepresentation but of lack of adequate information on quality. As a result largely of representations by the Consumers Counsel, the Commission asked the district boards to report the analyses of individual mines, and how these analyses were made. Carson urged domestic consumers to require their retail dealers to secure from producers an analysis of coal bought, so that sale of coal on a "standard of value" could be gradually established. A film, "Know Your Coal" was prepared to illustrate the importance of buying on an analytical basis.

THE QUESTION OF FREIGHT RATES

Another matter to which the Consumers Counsel gave considerable attention was that of freight rates for bituminous coal as determined by the Interstate Commerce Commission. Nearly all bituminous coal is moved by rail, and on the average the cost of freight exceeds the cost of production at the mine. About 20% of the total revenue of the railroads is derived from carrying this soft coal. This indicates the importance to consumers of the freight rate structure, and also its importance to the railroads. In the last few years the roads, in their frantic efforts to get more revenue, have on several occasions

petitioned the I.C.C. to turn temporary surcharges into permanent increases and so on.

Under the coal act the Consumers Counsel, as well as the Coal Commission, was authorized to intervene in proceedings before the I.C.C. and to initiate proceedings before it. In the exercise of this right the Consumers Counsel intervened before the I.C.C. at different times. In this intervention he called upon domestic consumers for support but with disappointing results. "It is your fight," declared the *Coal Consumers' Digest*, August 5, 1938, "and we are your advocate. Write us immediately if you will volunteer to organize consumers in your territory to protest either by appearance or otherwise against these increases." The *Digest* of September 24, 1938, announced that the Consumers Counsel would appear before the I.C.C. on October 17 against the petition of the class 1 railroads for permanent increases in coal freight rates: "Consumers Counsel will sponsor testimony and protests of any consumer or consumer representatives who desire his assistance."

The summarized argument of the Consumers Counsel against increased rates on coal, as set forth in a brief dated June 15, 1937,⁶⁶ was that 1. bituminous coal rates, with the proposed increases, would be unreasonably high, coal being made to bear more than its fair share of the transportation burden; 2. increased bituminous coal rates would intensify the trend to competitive fuels and to truck deliveries; 3. the railroads which would benefit most from the proposed increases were not the necessitous roads which would in fact be injured by the increases; 4. the bituminous coal industry is now in a depressed condition and increased coal rates would further depress it; 5. the recovery of the bituminous coal industry lags behind that of agriculture, wholesale commodities, and the railroads themselves; 6. the proposed increases in bituminous coal rates would be injurious to consumers.

⁶⁶ Before the Interstate Commerce Commission, Ex Parte 115 (reopened). In the matter of Increases in Freight Rates and Charges.

With reference to the position of domestic consumers the brief pointed out that the "largest single group of consumers in point of numbers, the domestic consumers, are unorganized and not articulate on their own behalf in this proceeding." ⁶⁷ It pointed out further that about one-sixth of the total consumption of soft coal was by domestic consumers, and "it is fair to say this . . . represented the heat and other fuel-comfort required by upwards of 60,000,000 people. By far the largest percentage of these 60,000,000 people belong in the low and medium-low income groups." ⁶⁸ The brief summarized data prepared by the Bureau of Labor Statistics showing the amount spent on coal by selected groups in different parts of the country and its relation to their other expenditures or their income. "Does the financial condition of these coal-carrying roads justify your Commission in saddling an additional burden of seven million dollars upon domestic consumers? In the case of these consumers, the traffic may bear the increased rates as they are unorganized and financially unable to protest and fuel is a necessity. Fortunately, you have another question to answer before imposing this burden upon them: Should the traffic bear it? The procedure followed by the railroads seems particularly objectionable since it would result in taxing marginal consumers in large part for the benefit of the opulent Pocahontas Lines." ⁶⁹ The brief went on to point out that the proposed freight rate increases would impose a substantial additional burden upon municipal governments which purchase bituminous coal with public money.

The Consumers Counsel took the position that the railroads could reduce their costs by reforming some of their practices and thus relieve the coal consumer of an improper burden. In a private communication dated November 4, 1937, the Consumers Counsel stated: "The Consumers Counsel contends that financial interests controlling railroads have no right to

⁶⁷ *Ibid.*, p. 26.

⁶⁸ *Ibid.*, p. 27.

⁶⁹ *Ibid.*, p. 29.

compel the coal consumer to dig into his scanty savings simply because the railroad needs money and can get it more easily from the coal consumer than from anyone else."

The Consumers Counsel lost his fight against rate increases when the I.C.C. in November 1938 made increases which had previously been granted on a temporary basis, permanent. He refused to admit final defeat, however, "because we are convinced the one way to assist the railroads is to make them reform, and that reformed practices in the railroads are essential to fair charges on coal consumers."⁷⁰

Another issue before the Consumers Counsel related to the status of urban cooperatives under the provisions of the bituminous coal act. The act enumerates 13 trade practices as unfair methods of competition under the code. One of these (no. 12) may have serious effects on urban cooperative wholesales. It restricts certain types of wholesale organizations in handling coal, but it is not clear whether cooperatives come under this restriction. To prevent possible discrimination the farm cooperatives were sufficiently powerful to secure a specific exemption for themselves through an amendment introduced by Senator Norris which exempts from this provision "bona fide farmers' cooperatives." This left the position of urban cooperatives who might want to handle coal at best uncertain. The issue so far, however, has not become urgent.

CONSUMERS COUNSEL DIVISION, DEPARTMENT OF INTERIOR

On July 1, 1939, the President, under authority of the Reorganization Act, abolished the Coal Commission and made the Secretary of the Interior directly responsible for the administration of the Bituminous Coal Act. The functions of the Commission were taken over by the Bituminous Coal Division of the Department of the Interior. The functions of the Consumers Counsel were taken over by the Office of the Solicitor,

⁷⁰ Interview with John Carson. See also *Coal Consumers' Digest*, Vol. I, No. 11, Dec. 13, 1938, p. 3.

Department of the Interior, with Frederic L. Kirgis, First Assistant Solicitor, as Director of the new Consumers Counsel Division; in December 1939, Paul Sifton, formerly Deputy-Administrator of the Wages and Hours Administration, was appointed Assistant Director.

In an address before the National Coal Association, October 25, 1939, Secretary of the Interior, Ickes, declared he would "insist that in the administration of the Coal Act, consumers be given the consideration that is their right, and that their interests be protected." He continued, with reference to the apparently anomalous position arising from the fact that both the Coal Division and the Consumers Counsel Division are functioning within the same department: "Lest you might think that I am an American version of a Gilbert and Sullivan Pooh-Bah, let me hasten to explain that the Consumers' Counsel functions independently of the Division which administers the Coal Act; in fact, the Counsel serves as a watchdog over the activities of the Coal Division in the interest of the consumer. Not being a Pooh-Bah, I know what the Coal Act is supposed to accomplish and whom the Consumers' Counsel is supposed to represent; and knowing these things, I shall continue to insist that each perform its independent functions as provided by the law."⁷¹

Representatives of the Consumers Counsel Division participated in the cross-examination of witnesses at price hearings before the Bituminous Coal Division Examiners from July 24, 1939, to January 20, 1940. In January, 1940, the Division marshalled an array of witnesses from its own staff and from the ranks of industrial consumers, cooperatives and independent technical experts to testify in support of consumer protests against the proposed structure of minimum prices. Thereafter, a 166-page brief was filed, setting forth in full the contentions of the Division on matters of general principle and specific detail. In March-April the findings of the trial examiners were released by the Coal Division. These largely ignored the posi-

⁷¹ *Coal Consumers' Digest*, Vol. II, No. 10, November 7, 1939, p. 2.

tion taken by the Consumers Counsel Division which thereupon responded with a substantial bill of exceptions and supporting brief. To date (June 1940), the Director of the Coal Division has not announced his final determination on the price schedules.

The Consumers Counsel Division made its strongest fight against the proposal to differentiate between the f.o.b. mine prices of identical coals when they are to be moved to market by different means of transportation, higher prices being proposed for coals to be moved by water or truck than for those by rail, thus taking away any advantage consumers might get from water or truck transportation. The Division also attacked proposed differentials for coals intended for different uses. Basically, "the Division has proceeded vigorously against the proposition which it has felt to be implicit in most of the price proposals offered to date, namely, that stabilization of the coal industry demands the permanent protection of every interest that obtained, and the freezing of every market in the exact mold that chanced to exist, at the time the Coal Act was passed. Without losing any of its drive for the achievement of immediate lower prices for consumers, the Division has insisted upon the essential identity, in the long run, between the interest of the coal consumer and the broad interest of the general public."⁷²

In addition to its activity with reference to the direct setting of minimum prices, the Consumers Counsel Division has filed exceptions to a schedule of maximum distributors' discounts recommended by the Examiners for adoption by the Director of the Coal Division; has urged that regulations be issued clarifying the status of farmers' cooperatives and conferring on them a right to the same discounts as those to be allowed distributors; and has continued to intervene and present argument in several proceedings before the Interstate Commerce Commission. It has also engaged in substantial research in the

⁷² Correspondence from the Assistant Director, Consumer's Counsel Division, June 19, 1940.

fields of production costs, price and distribution patterns and retail markets.

Under a regulation of the Coal Division, it appears that with the possible exception of state governments and their political subdivisions, the Consumers Counsel Division is the sole agency through which consumers may protest against established prices. It is likely that the real test of the Consumers Counsel Division and of the concept of consumer representation which it reflects, will begin when prices are finally published and the Division is called upon to entertain and sift consumer complaints against specific features of the established price structure, and to urge upon the Coal Division, by evidence and argument, the changes that are deemed desirable in the consumer interest.

CHAPTER II

CONSUMER POLICY AND INDUSTRIAL REGULATION

As already pointed out, the consumer policy advocated by the C.A.B. with reference to industrial regulation was no armchair product, but was developed under the peculiar circumstances of the N.R.A. code process. The N.R.A. offered an instructive experience in economic realism. General policy was distilled hastily out of particular issues. But it would, of course, be foolish to overlook the fact that at least some members of the Board and staff had already developed individual points of view concerning the problems involved.¹

The policy of the Board was expressed in a variety of ways. As applied in specific situations it was expressed in the formal reports prepared by the code advisory staff for the N.R.A. deputy administrators; in statements made at public hearings on the codes; also in statements made by Board representatives on the N.R.A. Advisory Council. The more general policy of the Board was outlined first of all in the policy guides prepared for the code advisers,² which were formally submitted for the N.R.A. records at the N.R.A. price hearings, January 1935. The Board also issued special statements with supporting factual memoranda from time to time, notably at the N.R.A. price hearings in January, 1934 and January, 1935. The Board submitted a carefully thought out statement on suggestions for code revision to General Johnson in February, 1934, and submitted suggestions for revision of the National Industrial Recovery Act to the National Industrial Recovery

1 See e. g. Robert S. Lynd, "The People as Consumers" in *Recent Social Trends in U. S.*, 1933; Walton H. Hamilton, "The Ancient Maxim Caveat Emptor" in *Yale Law Journal*, XL (8) June '31; also his "Affectation with Public Interest" in *Yale Law Journal*, XXXIX (8) June '30; T. C. Blaisdell, Jr., *Federal Trade Commission*, 1932; D. M. Keezer and Stacy May, *The Public Control of Business*, 1930.

2 See above, p. 46.

Board in January, 1935.³ Officers of the Board explained the Board's policy in considerable detail at the Senate Finance Committee's hearings on N.R.A. in March and April, 1935. And there were, of course, a number of statements made by members of the Board and staff on unofficial occasions which, though tempered by proper official discretion, illustrate and humanize the documents prepared in the course of their official duties.

Unfortunately, these various documents are not now easily available. Except for such copies as are on file in the N.R.A. records and in the special C.A.B. records now being maintained as part of a W.P.A. project under the supervision of the Consumers Counsel, A.A.A. and a few other copies still in the possession of former members of the Board and staff, many of the C.A.B. documents may be said to have disappeared. Since they contain the valuable record of a consumer policy toward industrial control, excerpts are quoted from them at length in the following pages. In no other way is it possible to convey a sense of the cogency of their argument and of the uniform excellence of style in which that argument was presented.

WHO IS THE CONSUMER?

Before proceeding to the formulation of a consumer policy, the Board had first to identify the group whose interests it was supposed to represent. In the first issue of the *Policy Guide*, September 1933, the Board suggested that "in contrast to the very general conception of the consumer as merely the buyer at retail, the buyer of any commodity is to be regarded as the consumer. This view of the consumer is based upon the obvious proposition that the retail market reflects in large measure what is done in the wholesale and capital goods market." This definition was immediately criticized by the newly-formed Emergency Conference of Consumer Organizations⁴ which addressed an undated memorandum to the C.A.B. at this time

³ Appendix I.

⁴ See above, p. 60.

in which it was pointed out that the commercial buyer was well able to protect himself: "We bespeak your interest for the ultimate consumer who has no aggressive defenders and who without the protection of the government is still defenseless."

In the October issue of the *Guide* the original paragraph on the "buyer as consumer" was changed to read: "The consumers' interest, which the Board is charged to foster and protect, is not to be regarded as limited to the retail markets for consumable goods. These markets obviously are affected by what is done in the wholesale and capital goods markets. Thus an adequate safeguarding of the consumers' interest calls for a check upon the processes of production and distribution straight through from the mine and field to the final disposition of what are customarily described as 'consumers goods.' The interest of the ultimate consumer, in short, requires that the buyer side of the market be protected throughout the whole range of industry."

The C.A.B., it should be noted, was here indicating that the area of consumer interest covers all industrial activity. "If buyers of manufacturing equipment pay unreasonably high prices," said Dr. Keezer,⁵ "it seems to us that the so-called ultimate consumer stands to lose and that the terms of such purchases are properly a matter of concern to the C.A.B." This emphasis on the wide area of consumer interest was made necessary by the efforts of some deputy administrators and industry representatives to limit it more narrowly. "To cite but one of many examples of disagreement which happens to be in the official transcript of an N.R.A. hearing," continued Dr. Keezer, "we were told by a Deputy Administrator that we had no proper concern with sales of leather belting, because 'it is not sold to this house or that house; it is sold to a factory, like machinery . . . I do not see where the consumer comes in.' We feel, however, and I submit rightfully, that the consumer does 'come in' and in a very important way."⁶

⁵ Address at Cornell University on April 19, 1934, p. 5.

⁶ *Ibid.*, p. 5.

Though at times there was an apparent confusion in differentiating between the two propositions (1) that the "consumer" is the buyer at each stage of the industrial process, and (2) that the consumer has an interest in each stage of the industrial process and must find allies where he can among the buying groups, nevertheless it seems to have been finally accepted by the Board that the group whose interests it was supposed to represent was the group of ultimate consumers—in short, the public in its consuming function. For instance, in its memorandum to the N.I.R.B. in January, 1935, the C.A.B. stated: "Every citizen has an interest in these issues as a producer and as a consumer. His interest as a producer is a particular interest which may often come into conflict with the interests of others. His interest as a consumer is a more general interest which all citizens have in common. It is from the point of view of this general interest that the C.A.B. offers its observations."⁷ As pointed out above⁸ the Consumers Counsel to the National Bituminous Coal Commission took a different position on this question.

The identification of its constituency as the ultimate consumer group led the C.A.B. into further difficulty. For General Johnson (and in this he had many supporters) could not see the difference between the public interest, which he presumably represented, and the interest of consumers, which the C.A.B. represented. And it followed in his thinking that consumer representation was largely superfluous. "Another disagreement in the definition of our job, and one that seems to me of much importance," explained Dr. Keezer,⁹ "is that generated by our view that the consumers' interest is not the same as the public interest. Perhaps because it has long been customary to refer to consumers as 'the consuming public,' many people, including some N.R.A. administrators, regard the public interest and the consumers' interest as the same thing. But as we see it,

⁷ Appendix I.

⁸ See above, p. 92.

⁹ Address at Cornell, April 19, 1934, p. 6.

there are in the case of privately-owned industry three conflicting interests—those of consumers, workers, and owners or managers—a proper balance of which is essential to the public interest . . . The fact that consumers in the flesh are not a group apart from workers and managers does not seem to us a valid reason for denying the existence of a distinct consumers' interest, and an interest whose clear-cut identification is essential to a well-balanced administration of an undertaking such as the N.R.A.”

There was good reason for strengthening the argument for consumer representation in the process of code-making, and particularly of code administration, by presenting the consumer interest thus narrowly as an interest in conflict with the interests of Labor and Business, all of which had to be reconciled in the public interest. But the emphasis thus placed on the tripartite make-up of industry, and of conflict between the parties concerned, seems to have been due rather to strategy than conviction, because the actual formulation of policy by the Board was always more broadly based than this implies. The first formal report of the Board, approving the cotton textile code, stated:¹⁰ “The consumer should not demand low prices at the expense of a plane of living lower than a subsistence level. So also the consumer does not want to make demands that would wreck an industry. There is a common good.” In a statement before the National Association of Cost Accountants on June 28, 1934, Dr. Corwin Edwards, then Chief of the C.A.B. staff, remarked: “As a member of the staff of the C.A.B., I suppose I may be expected by some of you to be interested only in the lowest conceivable price. That is not my position, and I think I may say it is not the position of the C.A.B. We are concerned for the long-run interests of the consumer. In a capitalist society such as ours, we believe that those interests are consistent with moderate profits for efficient business, and in any society we believe they are consistent with an effort to get the best possible organization of productive industry.”

¹⁰ N.R.A. Release No. 38, July 10, 1933, p. 4.

Throughout its history, the C.A.B. supported the claims of labor for minimum wages and maximum hours. In putting a floor under wages, Dr. Blaisdell explained at the Senate Finance Committee Hearings on N.R.A., an attempt had been made in the N.R.A. codes to protect labor from the risks of competition that properly should be taken by business. He pointed out, in a statement prepared for hearings on the employment provisions in codes, January 30, 1935: "Labor, we repeat, has much the same interest as does the consumer in the consequences of the codes. If the codes advance prices faster than they advance wages, living standards will fall, volume of output will decline. Employment will be reduced. The nominal wage gain will be more than canceled by the loss of jobs and the rise of prices. We do not believe that better wages need so to defeat themselves. The crux of the matter lies in the relationship between wages and costs."

In a public statement on policy, October 5, 1933, the C.A.B. declared that in challenging many of the code provisions, it did so not as an "adversary of either Labor or Industry, but solely from the conviction that no gains can be permanently held, if the consumer is hurt in the process."

GENERAL POLICY OF C.A.B.

The general position of the Board is perhaps best summarized in the well-thought-out statement on what the consumer wants, contained in proposals for revision of the National Industrial Recovery Act presented by the Board to the N.I.R.B. in January, 1935:¹¹

The consumer's interest requires that goods be turned out in large and increasing volume, that living standards may be advanced to the highest level to which our productive capacity and our technical skill can raise them. Competition which contributes to this end must be encouraged, prices kept low. There must be maintained in the industrial system a degree of flexibility which will permit the low-cost to displace the high-cost plant, the more

11 See Appendix I.

efficient producer to supersede his less efficient competitor. The door must be kept open to new products and processes, to new blood and new ideas.

The evidence is conclusive that the people of the United States do not have and never have had an average standard of living high enough to justify complacent acquiescence in any program which restricts production. Thousands are improperly fed, badly housed, inadequately clothed. Nearly all of us could increase our consumption of goods and services without over-indulgence. In such a situation it is fantastic to talk of over-production. There has been over-capacity only in the sense that industry has produced more than it could sell at high prices. If prices are not so high as to prevent it, idle labor and capacity will be put to work and the so-called surpluses of the goods of which our people stand in desperate need will shortly disappear.

The consumer wants a low price, but he does not want such a price if it is to be obtained only by depressing labor standards, by impairing the quality of goods, by practicing misrepresentation or by squandering precious natural resources. He does, however, want the lowest price which is consistent with conservation, with honest merchandising, with proper quality and with decent wages, hours, and working conditions.

In its first report on the cotton textile code, July 1933, the Board based its approval on the fact that the code, because of its abolition of child labor, its reduction of the maximum work week, and its raising of the minimum wage, was calculated to increase mass purchasing power, which in turn increases consumption, and therefore stimulates production. It declared that the consumer does not object to higher prices as such; he objects only if general prices rise higher or more quickly than wages and income.

At this time it seemed that the Board would interpret its main task to be, first, to protect the position of labor under the codes, particularly with reference to minimum wages and maximum hours; and, second, to watch for any tendency in prices to rise faster than income as men were put back to work

and wages were raised. "Prices must not rise above purchasing power," and "Keep prices down," were the slogans.

But as industry after industry brought up its draft code for approval by the Administration, members of the Board became alarmed by "the diversity and subtlety" of the provisions for price and production control included in them, and they began to question the general effect that the operation of such provisions would have on the consumer interest. The Board continued to support the wages and hours program, but that was now primarily the function of the Labor Advisory Board. It also continued its efforts to measure changes in purchasing power resulting from the codes' going into operation, though this task proved impossibly large. But, increasingly, its time and energy were devoted to analysis and criticism of the trade practice provisions which were being written into the codes with a view to establishing or increasing to a greater or less extent industry control over the price and production policies of the individual business. The codes were designated codes of "fair competition," but most of them seemed to aim directly or indirectly at minimizing competitive pressures through various forms of industry control.

"Destructive price cutting" was Enemy No. 1 to business. It could be overcome, in the opinion of industrial leaders, only by banding together, usually under the leadership of dominant groups in an industry. "The government, had it been so minded," declared Mrs. Rumsey to the Associated Grocery Manufacturers on November 20, 1934, "would never have dared propose so many laws interfering with business discretion as are being urged upon the government by business men themselves." Dr. Keezer also drew public attention to the fact that "The radical economic departures have been pressed by business groups who would bitterly resent any label other than that of Conservative. Uniform price-fixing by industries, for example, is basically one of the most radical of departures in

the kind of economic system that has developed in this country." ¹²

The codes were the vehicles through which the attempt of the Roosevelt Administration to increase purchasing power through a system of maximum hours and minimum wages was to be carried into effect. To get the code-making parade started in a big way, it might have been necessary to give industry special inducements in the form of price-control provisions, and this seems to have been General Johnson's opinion. "But," declared Dr. Keezer, "if increases in wage payments are converted into spring boards from which to leap to new schemes of private monopoly, the chances of having the N.R.A. result in a net increase in purchasing power are very poor indeed." ¹³

In general, the Board, in exercising its advisory function, tried "to see that fair competition is not eliminated in those parts of our economic system where it still persists—they are quite numerous and important—and also to see that it is not further eliminated in those economic sectors where it still prevails in some degree, unless compensating safeguards for the consuming public are provided . . . In general, and always willing to depart from any rigidly fixed views in deference to a peculiarly cogent set of facts, the C.A.B. has counselled against the inclusion in codes of provisions restricting the scope of competition apart from those provisions establishing minimum wages and maximum hours." ¹⁴ In short, the C.A.B. considered that the burden of proof should be put on an industry to show that any proposed limitation of competition was justified by the facts of the situation, always keeping in view that "consumer protection against unreasonable prices and lowered quality of goods lies at the heart of the whole recovery program." Any limitation of competition should be accompanied by an increase in public control. The degree and form of public control which

¹² Address at Cornell, April 19, 1934, p. 10.

¹³ *Ibid.*, p. 7.

¹⁴ *Ibid.*

the C.A.B. advised depended upon the power vested in the industry. In addition to "public control," the Board consistently argued that there should be specific consumer representation on each code authority. The consumer could not afford to barter such safeguards as he possessed under competitive conditions for less than that.

In proceeding to a more specific analysis of consumer policy as developed by the Board, it is proposed not to exhaust the subject but to select the more significant of the trade practice provisions concerning which the Board prepared a considerable body of information and opinion.

PRICE POLICY

The C.A.B. was, with few exceptions, opposed to proposed code provisions aimed directly or indirectly at building floors for prices at various stages of the industrial process—manufacturing, wholesaling, retailing. Such provisions included an extraordinary variety of devices, most of them so "dully labelled," in Dr. Keezer's words,¹⁵ as to make a full recital of them forbidding. "Not only are many of the provisions almost prodigiously complicated, but even their general labels are so forbidding or uninteresting that a mere recital of them is for many an effective soporific . . . The fact that there is no dramatic value inherent in these labels, seems to me, on the whole, unfortunate. I recently talked with a distinguished newspaper correspondent who remarked sadly that he could not report the N.R.A. with any degree of satisfaction because of this fact. 'You cannot dramatize provisions against selling below cost,' he said, and hence dismissed them as inappropriate newspaper copy. The fact is, of course, that the content of a particular provision against selling below cost and the manner of its administration may reshape entire industries and crucially affect the welfare of persons depending upon them for their livelihood."

¹⁵ *Ibid.*

Minimum price-fixing, provision for a fixed labor mark-up above invoice or replacement cost, provision for resale price maintenance, open price filing, zone freight and basing point systems, functional price differentials to control the channels of distribution, limitation of output by plant quotas or fixed machine hours, restrictions upon the installation of new machinery—what position should the C.A.B. take as representing the consumer interest on these highly complex and controversial questions? What effect on the consumer immediately and in the long run would the use of such devices have when used separately or in combination to make a complex price-control pattern? What was the existing structure of the industry and to what extent would these devices serve to bolster existing controls that had escaped attack under the anti-trust laws?

The Board, working under great pressure, never assumed that it had completely thought through its position on many of these problems, and it maintained throughout the N.R.A. period an experimental attitude on particular issues arising in the vast and varied range of American industry, large and small, local and national. Members of the Board and staff were acutely conscious of the lack of specific information on which to base an intelligent opinion on many of the problems with which they were confronted. Nevertheless, there was a remarkable consistency in the C.A.B. point of view and an increasing vigor in its presentation. Time was on its side.

MINIMUM PRICE-FIXING

Senator Wagner, acting as one of the leading spokesmen for the Roosevelt Administration, had asserted in the Congressional debates on the National Industrial Recovery Bill, June 8, 1933, that there was to be no price-fixing under it. "It is not contemplated that prices shall be fixed, because the fixation of prices is not in conformity with fair competition," he declared.¹⁶ Nevertheless a large number of the early codes

¹⁶ N.R.A. Hearings, Senate Finance Committee, 74th Congress, 1st Session, p. 633.

were approved with provisions empowering the code authority for an industry or sub-division to fix a minimum price or a fixed mark-up, usually on some prescribed cost basis. Such provisions were commonly accompanied by the condition that items in the cost formula on which price was to be based, together with the actual cost data, should first be submitted to the Administration for approval. As the Administration became increasingly hesitant about fixed-price policies, approval of the cost systems was held up, and only about 40 were actually agreed upon. This situation, as the Advisory Council pointed out on October 26, 1934, was the cause of considerable irritation in the industries concerned, some of which were spending thousands of dollars in collecting cost data and preparing formulae under provisions of approved codes without getting action on them or knowing whether any action would be taken.

In general, the C.A.B. opposed minimum price-fixing under the codes as likely to defeat the plans of the Administration for an increase in mass purchasing power. In the early policy guides it was suggested that advisers should be open-minded towards specific proposals for various degrees of price control and "in gauging them should give great weight to their potentialities in generating greater consumption and output." But, in any case where price control was permitted, provision should be made for adequate public supervision. And it is possible that in the early days the C.A.B. would have been more willing to approve experiments in this field, if industry had not been so strongly opposed to any form of effective public supervision. As experience seemed to strengthen doubts as to the wisdom of permitting price-control in an industry, the Board took a steadily stronger position against it, while suggesting that the particular evils aimed at through price-fixing could be more effectively controlled in other ways—*e.g.*, by provisions directed to specific competitive abuses and agreements on "fair standards of quality."

The Board recognized two sets of circumstances in which price-fixing might be given favorable consideration, (1) in the

natural resource industries, and (2) in industries suffering from an "emergency" situation.

In Natural Resource Industries

In the natural resource industries some control might be necessary as a conservation measure. "The consumer wants a low price," declared the C.A.B., "but he does not want such a price if it is to be obtained by . . . squandering precious natural resources."¹⁷ On this general ground, before any definite consumer policy had been formulated, the C.A.B., in August, 1933, concurred in approving the lumber code, with its far-reaching provisions for price-fixing and production control without any effective supervision by the Administration. In giving its approval, however, the Board urged, ineffectually, "that the production and price provisions be matched by a carefully formulated administrative and statistical set-up which can be utilized for consumer protection if this should prove necessary."

The general position of the Board relating to price-control in the natural resource industries was that the long-run consumer interest in conservation had been poorly protected by entrusting prices to determination by cut-throat warfare. There was a strong case for limiting competitive price determination in these industries, providing it was done under adequate public control, including "full and continuous access by public representatives to records of prices, costs and production; and a mandate to these public representatives specifically written into the code, to report publicly to the President any fixation of prices which they find to be unreasonable."¹⁸

In December, 1933, an elaborate price brief was prepared by the Board's staff, with the cooperation of Dr. Walton Hamilton and Dr. George Stocking, members of the Board, in opposition to a schedule of prices for petroleum products proclaimed by the Secretary of the Interior as Administrator of

¹⁷ See Appendix I.

¹⁸ *Policy Guide*, September 28, 1933, p. 2.

the Petroleum Code. The question in this case was not one of ineffective public supervision, because the Petroleum Board in charge of the code, consisted of Administration representatives. The specific objections made by the C.A.B. statement¹⁹ were to the effect that, under the schedule, the consumers' bill for petroleum products would be increased many times more than the increase in wages and would therefore defeat the objective of an increased purchasing power. After making a number of specific objections to the petroleum price schedule, the C.A.B. statement proceeded to a general argument emphasizing the complexity of the problems always involved in the transfer of price control from the market to an administrative board, and the difficulty of maintaining prices as determined without provision for production control. It drew attention to the fact that the petroleum code contained provisions for the control of output, and suggested that more attention should be given to this device, "which may be used effectively to stabilize the industry and protect both the interests of the industry, and the interests of the consuming public. It is important not to discredit the use of this device by a premature and ill-considered venture in price-fixing."

The possibility of using the device of output control in the regulation of the natural resource industries was given increasing attention by the Board. The general conclusion was in favor of some form of production control, supervised by all interests concerned, in preference to the more superficial and complicated method of minimum price-fixing. In the case of soft coal, for example, the Board felt that control of mine output under proper public supervision would have a more salutary effect on the industry than the proposed fixing of prices by business groups subject to subsequent review by government officials.

¹⁹ A good summary of this brief was published in the *Survey Graphic*, February, 1934.

Price-Fixing Under "Emergency Conditions"

Early in 1934, the Board was confronted by the necessity of taking a position on price-fixing in another set of circumstances, the so-called "emergency" price-fixing proposals. At that time the draft code for the retail solid fuel industry was under consideration. The Board opposed the extensive powers for price-fixing asked in the code, and the N.R.A. officials themselves showed growing concern over price-fixing provisions, partly no doubt because of increasing hostility in Congress. The N.R.A. thereupon devised the plan outlined in an office memorandum of February 3, 1934, for including in codes a provision enabling the code authority in certain circumstances to make a declaration of "emergency," and, following that, price-fixing on a basis of lowest reasonable cost would be permitted for limited periods.

"Historically," declared the C.A.B.,²⁰ "we believe the concept of emergency price to have been the product primarily of an emergency within the ranks of N.R.A. itself—a fear grown to panic proportions that minimum price procedures were becoming too firmly entrenched in formal code provisions. Refuge was sought in a ceremony to be invoked only on rare occasions when, by virtue of an emergency proclamation and the recital of an appropriate cost incantation, price practices hitherto suspected were to emerge wholesome and pure."

In June, 1934, the N.R.A. formally declared itself²¹ opposed to price-fixing in future codes, or in code-amendments, but made an exception in the case of emergencies "which make such action necessary to halt destructive price-cutting, protect small enterprises, curb monopolistic tendencies, or maintain code wages and working conditions." But emergency prices were to be based on "the lowest reasonable cost" and were to be limited to a period of 90 days with certain provisions for renewal.

²⁰ C.A.B. Report on "Emergency Price Experience," by Ben. W. Lewis, submitted at N.R.A. Price Hearings, January, 1935, p. 1.

²¹ N.R.A. Memorandum 228, see above, p. 76.

A number of industries which for various reasons had not so far succeeded in getting minimum price-fixing powers now sought to come in under the shelter of an emergency declaration. The C.A.B. was alarmed by the new development. What was "an emergency?" The question was referred to the Advisory Council in connection with local emergency determinations under the retail solid fuel code. On August 3, 1934, the Council recommended that the code authority should consider a case for declaration of an emergency only upon petition signed by 75% of the industry in the district covered by the petition. Declaration of an emergency should be based upon concrete evidence of existing or ensuing demoralization, rather than upon conjecture as to what might happen. Evidence of adequate effort to enforce wage rates and rules about full weight and grading should precede declarations of emergency. The declaration of an emergency should put the responsibility upon the industry to endeavor, in cooperation with the appropriate N.R.A. officials, to formulate a constructive program aimed to eliminate the fundamental causes of the emergency. No declaration should be made until after public hearings had been held, at which all types of evidence that any interested party might want to introduce should be admitted.

The C.A.B. did not always consistently oppose provisions for emergency prices. But it undertook with its limited resources to make studies of the operation of emergency prices in different industries, and the results strengthened its growing conviction that price-fixing was no panacea even for "emergency" conditions. The Board's general conclusions were presented at the N.R.A. Price Hearings in January, 1935, in a statement on "Emergency Price Experience," prepared by Dr. Ben W. Lewis of the C.A.B. staff. This statement declared, in summary, that "The experience of the past months under the various clauses that have been devised to express the emergency concept has demonstrated rather clearly that price-fixing under the cloak of an emergency is still price-fixing and immune to none of its traditional infirmities."

A Cost Basis for Price-fixing

As the code-system developed, the C.A.B. became very critical of the use of "costs" as a basis for price-fixing. In its 1934 memorandum on code revision, the Board stated:

Provisions against selling below cost, as we understand it, were inserted in the codes in an effort to check predatory price-cutting. We assume that such provisions were not intended to serve as a means of fixing uniform prices for an industry, with such prices so fixed that efficient concerns suffer a restriction of output for the benefit of less efficient concerns. Nor do we think it was intended to have such clauses used to maintain the inflated capital structure of 1929. As these provisions have been written in certain instances, however, they provide, in effect, for relatively high and uniform prices for industries as a whole. This is done by basing prices upon average costs which are necessarily higher than the costs of the more efficient producers. . . . Many of the provisions include such elements of cost as charges for excessive and obsolete equipment, selling expenses, and even returns on investment. Such provisions raise the question of whether or not recovery can be secured while basing minimum prices upon charges for the use of plant and equipment, etc., which would only be appropriate to a far larger volume of consumers' purchasing power than now exists, and in some cases than ever has existed.²²

There were two main questions involved—whose costs were to be selected, and which costs?

During the first few months of N.R.A., the main emphasis in the codes was on the use of "average" costs to protect the position of the "average" business. This, in the opinion of the C.A.B., penalized the consumer by depriving him of the advantages of business efficiency. By way of illustration Dr. Corwin Edwards pointed out²³ that in the retail coal industry, some dealers' costs were as high as \$3.50 a ton, while others were around \$2; some truckers who had no coal yards might

²² C.A.B. Suggestions for Code Revision, February 19, 1934, p. 5.

²³ Address at the University of Missouri, April 30, 1933.

even have lower costs. The C.A.B., while generally opposing price-fixing as being against the consumer interest, argued that if price-fixing were adopted it should be on the basis of individual costs, in terms of prohibiting the individual business from selling below its costs of production—though the Board believed this was probably unenforceable.

There remained the second question: what were the proper costs for price-fixing purposes even in an individual business? There was no clear consensus of opinion on this question among any of the groups whose interests were represented in N.R.A. What was meant by “lowest reasonable costs” or “socially necessary costs?” The lumber industry, to illustrate one point of difficulty, had a capacity to produce about 60 billion board feet of lumber a year, but in 1934 it produced and sold 13 or 14 billion, less than 25% of its capacity; if the cost of mills and other equipment was to be protected, it could only be by asking the consumer to pay for the equipment that was at present standing idle. In general the C.A.B. argued against the inclusion of any cost that was in any way open to question.

Dr. Edwards, speaking on his own behalf and not for the C.A.B., discussed the problem of costs in a more theoretical way before the National Association of Cost Accountants on June 28, 1934:

The thesis I want to set forth is that it is sound business and economics upon some occasions under some circumstances to sell below cost. . . . Sometimes unless you reinterpret costs, you very frequently cannot afford to base prices on costs. Prices after all have the function of selling goods. . . . The C.A.B. has been saying for some time that we believe you should distinguish in submitting cost clauses and cost formulae between those principles which are sound cost accounting for an individual enterprise and those principles which are a sound basis for writing criminal law, and that you should include in the second only matters about which there can be no reasonable doubt. . . . We have on occasion gone so far as to suggest that in a particular industry if you are going to use

this principle all you can safely include is labor and materials. In other industries we have gone farther, but we have urged rather consistently that those items in cost accounting about which there is the greatest disagreement, the most rapid development of new ideas, the greatest variation from one plant to another—that at least those items shall not be frozen and given in their frozen form the status of law.

In short, the C.A.B. maintained that costs, once incurred in a dynamic competitive society, constitute no proper criterion for prices. As Dr. Edwards said, "Prices after all have the function of selling goods."

But these basic questions of cost-selection were, for code-making purposes, largely academic, because there were so few cost data of any kind available. Final decisions were in fact made on a basis of business judgment as to what prices should or could be. The C.A.B. statement on "Emergency Price Experience," declared that reliable cost data had been almost completely absent from actual price determinations, and that in no instance had they afforded any objective measure of what was representative or reasonable. It pointed out for example with reference to the retail coal industry that, when cost data began to trickle into Washington for review, the coal section of the Research and Planning Division, N.R.A., was astonished by its paucity. "The significance and reliability of the figures which could even be *considered* for use," it declared, "were such that only after weeks of study and arbitrary revision was the Division . . . in a position to issue cost tables and charts."²⁴ In October, 1934, the N.R.A. Advisory Council, in recommending the appointment of a special representative committee for the rapid review of the unreviewed coal prices in legal force in a number of areas, said it was impossible to follow a sound economic course, for the season was already late, and, moreover, "the careful work of the Research and Planning Division has yielded only approximate and highly arbitrary results. At

²⁴ C.A.B. Statement on *Emergency Price Experience* prepared by Ben. W. Lewis for Price Hearings, Jan. 9, 1935, p. 3.

the present time, prompt action in dealing with those unreviewed prices is more important than the further loss of accuracy in a necessarily inaccurate technique." ²⁵

This paucity of cost data was not peculiar to the retail coal industry as the C.A.B. in its "Emergency Price Experience," emphasized. For most industries, reliable and significant figures were almost entirely absent, and even to the limited degree to which they were available, "they had, in fact, indicated no prices and determined no conclusions."

Effective administrative review might be assumed to act as a check on an "unfair" or "arbitrary" level of fixed minimum prices, but as a matter of fact it was impossible to ensure such effective review. A statement on "Experience with Price-Fixing under the Codes," prepared for the C.A.B. by Dr. Corwin Edwards and submitted at the Price Hearings in January, 1935, illustrated this difficulty:

If the Administration could get and watch all the facts about each industry, the requirements of administrative approval might sufficiently safeguard unfairness in these legally protected prices. But this cannot be done. In the Business Furniture Industry, for example, when the manufacturer has set his price upon a so-called "base product," schedules established by the code authority tell him how much more or less he shall charge for other items in the same line. How can a government possibly watch the use of this power in the prices of perhaps 17,000 items? A government statistician told me last week that merely to maintain in Washington a file of the prices of commodities sold under N.R.A. codes would require an establishment equal to that of the Library of Congress.²⁶

The C.A.B. raised the whole issue of price-fixing on a nominal cost basis without adequate cost data in connection with a case on cost determination in the Paint, Varnish and Lacquer Mfg. Industry which was referred to the Advisory

25 A. C. Decision No. 61, 1934, p. 53.

26 N.R.A. Hearings, Senate Finance Committee, 1935, p. 869.

Council on February 8, 1935.²⁷ An able firm of accountants employed by the industry had tried to get figures from 161 of the approximately 2,000 members of the industry, but it was able to get usable figures from only 40 firms, no one of which manufactured all the products of the industry. As a result, available cost figures on particular products were very small, and such figures as were returned varied widely between different firms, the highest cost submitted being as much as two or three times the lowest. The accountants, themselves, said in an interim report: "The results displayed, it should be clearly understood, are not, in our opinion, acceptable in their present form as a basis of proclaiming lowest reasonable cost or loss factors, according to the provisions in the Code, and we do not submit them as final and representative." Nevertheless, temporary cost schedules were approved, and later the industry applied to have them made permanent. A majority of the members of the Advisory Council was prepared to recommend this action, since no complaints had been received on the temporary schedules.

The C.A.B. considered the question at issue so important as to require a statement of their views in a minority report, an unusual procedure in the Advisory Council. They declared that:²⁸

Stated baldly, the problem is whether the N.R.A. shall give the force of law to costs which are supposedly based upon a factual study when the result of that study is to show that no adequate facts are available. . . . Processing costs were to be the lowest reasonable cost of manufacturers, large and small, throughout the industry. To us the only reasonable intent of these words is that a broad study of the industry's costs was to be made, and that the processing costs as finally established were to correspond with the lowest costs which actually prevail anywhere in the industry. Although such a study was attempted in good faith, and conducted by accountants whose ability was unquestionable, it has not

²⁷ A. C. Decision No. 169, 1935, p. 255.

²⁸ *Ibid.*, p. 257.

produced the information of the sort contemplated in the code. Quite aside from the merit of cost clauses in general, we do not believe it is economically wise or legally tolerable to require members of an industry to observe a floor price which is not adequately buttressed by accounting experience. The offer of permission to members of the industry to sell below the code prices if they care to take the time and trouble to prove that their costs are actually lower will not be sufficient to justify the making of this law, any more than it would have been sufficient to justify a code provision in which frankly arbitrary costs were set up without any accounting preliminaries.

It is urged in favor of the code provision that substantially the same schedule of prices has prevailed for some time with relatively little complaint and without any conspicuous price increase. The C.A.B. found, during the period when it was responsible for the handling of complaints by consumers, that public protest seldom arises until a situation has become not only inequitable but intolerable, and that even then the volume of protest appears after rather than before Government action which throws the issue into headlines. As for the price-history of this industry, we know that there was a considerable price increase in the summer of 1933 which presumably occurred partly in anticipation of the code. We do not know, nor do we believe that the N.R.A. knows, whether the level of prices then reached was reasonable, and whether without the later support of code provisions, prices would have declined from that level. The absence of complaints by groups which have no organized machinery for complaining and the absence of sharp increases in a price whose present relation to cost is unknown—these do not seem to us sufficient justification for writing laws without adequate evidence.

The majority recommendation of the Advisory Council was not approved by the N.I.R.B.

Results of Minimum Price-Fixing

Despite the opposition of the C.A.B., minimum price-fixing in some form was approved in a number of codes, and the Board endeavored to study its effects in some of the industries in which it had been introduced.

Enforcement presented great difficulties, and there was bootlegging in violation of the codes to a greater or less extent in different industries. A wide variety of methods was used in concealed price-cutting—large cash discounts to customers, more liberal credit terms, delivery of a larger quantity than ordered, delivery of better quality, advertising allowances, and so on. The C.A.B. pointed out that efforts to bolster a fixed price led in many instances to an attempt to extend the area of regulation in an industry, particularly to an attempt to extend the control of manufacturers over distributors, both wholesale and retail. In other instances bootlegging became so widespread that the industry concerned was led to apply for a suspension of the price-fixing provisions in its code.

“Even where the breakdown of price-fixing has left actual prices substantially free,” reported Dr. Edwards, “the process has been harmful to the consumer. Business attention has been turned from management to code politics. The naive enterprises which took their code seriously and obeyed it have been penalized regardless of their relative efficiency and inversely to their relative integrity. Buying and selling have proceeded under a new speculative risk—that an N.R.A. decision might alter existing prices. Code authorities have collected from their industries, and indirectly from the public, large sums of money to be spent in administering unduly complicated codes. For the most part these effects are roundabout and not measurable. But the consumer’s interest in them is as great as his interest that industry shall be economically regulated and that business success shall depend upon efficient management rather than intrigue.”²⁹

Mrs. Rumsey had previously emphasized the same point:

If fixed prices protect firms which are over-equipped, inefficient or out-of-date in their ways of doing business, these prices cannot be fair to consumers. Neither are they fair if they tie up the market in such a network of regulations that business becomes

²⁹ N.R.A. Hearings, Senate Finance Committee, 1935, p. 872.

more concerned with saving the system of regulations from breakdown than with the economies to be effected by good management.³⁰

The substantial record the Board was able to compile from its studies of different industries under minimum price-fixing, was, in its opinion, a record of "failure and futility." Dr. Lewis reported that in no cases had the fundamental causes which had produced the emergency been changed or removed. Illustrating from the tire industry, he said:

It is difficult to believe that the tire industry is fundamentally on a sounder basis as the result of its suspension of price-cutting during the past summer. The experiment was characterized by violations of price restrictions, slackening of sales, and strife and bickering within the industry. When moved by the sheer weight of the administrative burden and the growing volume of discontent, the Administration terminated the emergency, not a single item in the total picture had been openly affected.³¹

As a general conclusion, Dr. Lewis stated that, regarded in their most favorable light, the declared emergencies "have furnished periods during which an industry torn by strife might pause for rest. The outward manifestations of the struggle have for the moment been stayed by truce. Not infrequently, as we have seen, the breathing spell itself has been disturbed by new difficulties and members and customers have been menaced by new hazards—the special product of the emergency period itself. But even a quiet breathing spell must be looked at askance. In a very real sense it must be regarded as affording an undesirable delay in the working out of industrial evolution and development; particularly so to the extent that it revivifies and strengthens forces resisting inevitable change. The C.A.B. believes that most composites of industrial difficulty are not properly to be thought of as emergencies at all; and that genuine industrial emergencies are misconceived

³⁰ Address before the Associated Grocery Manufacturers, November 20, 1934, p. 2.

³¹ N.R.A. Hearings, Senate Finance Committee, 1935, p. 874.

when they are approached and dealt with solely in terms of selling-prices instead of the basic forces responsible for and manifested by the collapse.”³²

Some of the problems involved in price-fixing under N.R.A., as the C.A.B. saw them, can perhaps best be illustrated from its study of price-fixing in the retail coal industry, as reported in a statement on “Fixing Coal Prices,” prepared by W. L. Chandler of the Board’s staff for the N.R.A. Price Hearings in January, 1935. This is especially interesting in view of the later price-fixing experiment under the National Bituminous Coal Act, though the latter is limited to mine prices, and is not directly concerned with the retail level.

Price Fixing in the Retail Coal Industry

The code for the retail solid fuel industry, approved on February 14, 1934, permitted the National Coal Authority set up under the code to determine the existence of an emergency in a coal area, and, thereupon, each divisional code authority was authorized to prepare a schedule of minimum prices for its area, based on “lowest reasonable cost.” This schedule went into effect when approved by the Administration appointee on the National Coal Authority (which represented the industry), subject to subsequent review by the N.R.A. Administrator.

During the summer of 1934, there was a storm of protests in different areas over the prices fixed under these provisions. These came from domestic, governmental, and industry buyers, and from some elements in the trade affected by direct or indirect attempts to eliminate low-cost dealers from the market. The N.R.A. then undertook a review of the price schedules over the violent protest of the industry; and, as a result, the National Coal Authority resigned. By the end of October the prices in 52 areas had been reviewed, and in all cases modified, in some instances as much as 30%. Meanwhile, on October 24, the N.R.A. Advisory Council had recommended the setting up

³² *Ibid.*

of a special N.R.A. committee to complete the review before the winter season rush, since the "present situation in which many areas have unreviewed prices in legal force is indefensible."

The C.A.B. devoted a great deal of attention to the coal situation throughout this period. Some of the newly organized County Consumers Councils took an active interest in the local price schedules, particularly the St. Louis County Council; and the C.A.B. prepared a series of questions to help consumer representatives who appeared at the local hearings. It was necessary that the transcript of hearings should include as much information as possible, because on it the N. R. Administrator based his final review. The C.A.B. asked that the questions raised should cover both the condition of the industry in general and the accuracy and significance of such cost data as were submitted.

The C.A.B. also prepared a statement dated June 28, 1934, on its general position relative to price-fixing in the retail coal industry. "This experiment," the Board declared, "was undertaken despite our protests; none-the-less, as a major experiment in social control, we have an abiding interest in its conduct and results." The whole program must be prevented "from degenerating into a country-wide panorama of local scandals, discrediting the institution of price-fixing per se, and the Administration which has sponsored it. We hold no brief for arbitrary price-fixing in a competitive market, but we want this experiment to be undertaken with such cautious, purposive direction that it may be seen conclusively to succeed or fail on its real merits." They urged a more critical attitude on the existence of an emergency. They said:

We shall not be willing to find that an emergency exists in any locality upon a showing merely that the earnings and position of existing established dealers are threatened by newcomers who represent new and less costly methods of doing business.

They urged also frank recognition of the real nature and arbitrary character of price determinations which were only nominally based on cost. They said:

We urge frank recognition of the fact that this industry (and the Administration, indirectly, through the practice of review) is engaged in the establishment of prices expressive of policy, and not in the finding of prices dictated inexorably by costs records. . . . Price-fixing must be accompanied by direct measures looking toward a fundamental correction of the causes responsible for the undesirable conditions.

Facts revealed during the process of review showed, in the opinion of the C.A.B., as reported at the January, 1935, Price Hearings by Mr. Chandler, that the "lowest reasonable costs" proposed for various regions were in fact so high as to protect uneconomic retail establishments, maintain local association prices and in many instances eliminate the competition of truckers hauling direct from the mines to the consumer. The Board maintained also that arbitrary price differentials were set for different classes of customers (domestic, governmental, industrial and so on). Prices as fixed were based on inadequate cost data or none at all, the divisional code authority in most cases "drawing on their own experience and trade knowledge." Thus no attempt was made to answer the many controversial questions involved in the selection of costs.

Outlining suggestions as to what other course might have been taken to help the industry, Dr. Lewis said:³³

If the man who trucks coal from the mine to the bin is to be regarded as a "public enemy" we might have declared him to be such and driven him from the trade by law; if he or others misrepresent quality and give short weight, we might have provided public inspection and public scales; if racketeering, oppressive or potentially monopolistic dominance is threatened by certain units, we might have invoked the criminal law, including a possibly rehabilitated anti-monopoly statute; and if circumstances establish

³³ *Ibid.*, p. 875.

the complete ineffectiveness of competition, we might have moved the industry into the realm of complete regulation of services and quality on a public utility basis. And if perchance we feel that the particular trials and tribulations which plague the industry in certain quarters are, after all, only the typical incidents of industrial change and progress, just conceivably we might have done nothing at all. Somehow, price-fixing, the sole remedy which we sought so enthusiastically to administer, seems not to have been called for in the premises.

In summarizing the point of view expressed by the C.A.B. and its code advisers on the subject of price-fixing under the codes, attention should be called to the testimony given at the N.R.A. Hearings of January, 1935 by Dr. Keezer who maintained that the weight of experience supported the position taken by the Board against any large-scale experimentation with price-fixing.³⁴ The Board's views could no longer be dismissed as theoretical, he urged. He recommended that price-fixing provisions in the codes should almost without exception be done away with at once and not reinstated except "upon a showing of both necessity and desirability far clearer than that which had been submitted prior to the adoption of any of these provisions." This argument related to emergency price-fixing, as well as to price-fixing in general. Dr. Keezer took exception to a recent policy statement by the National Industrial Recovery Board which approved emergency price-fixing, while rejecting price-fixing in general. Official approval of emergency price-fixing, he pointed out, invited efforts to convert the "usual case" into an "emergency," and, moreover, price-fixing "had been demonstrated to have no capacity to administer effectively to industrial emergencies." He went on further to argue that price increases under the N.R.A. were a serious threat to economic recovery. Evidence seemed to indicate that since the beginning of N.R.A. the increase in money earnings per industrial worker had been more than offset by the increase in the cost of living; and further that

³⁴ *Ibid.*, pp. 605-607.

increased prices had vitiated in substantial part the increase in money income of the nation as a whole.

In reply to a question from Dr. Leon Henderson as to whether he would admit the necessity of price-fixing under panic conditions, Dr. Keezer declared: "I am not at all persuaded it is an advisable method of dealing with the difficulty in that the trouble that brings out the demand for price-fixing does not lie on the outside, and when you try to fix prices without production control, and so forth, it is like trying to cure a cancer by surface application."

Dr. Henderson then suggested that all that was intended in emergency price-fixing was to create a period of stability during which attention could be given to other factors that impinge on price.

"I think," said Dr. Keezer in reply, "any time the N.R.A. authorizes the fixation of a price it assumes a responsibility to the public to regulate the industry. I think anything short of that is an abuse of the consumer and of the public."

"Would you agree with me," asked Mr. Sidney Hillman, of the Labor Advisory Board, "that we do not want to go back to a condition of just letting things take care of themselves, or do you hold the point of view that if you let things take care of themselves in the long run the situation will take care of itself?"

To this, Dr. Keezer replied: "It is not my reading of history that we have ever let things take care of themselves. We have heard it asserted that we, of the C.A.B., worship *laissez faire*. That is not true. We have never had *laissez faire*."

In taking the position that price-fixing under the codes had failed, the C.A.B. did not say that price-fixing cannot be made effective in industry. Dr. Blaisdell emphasized this point in his testimony before the Senate Finance Committee in April, 1935, "The striking thing to me, always, is that one of our dicta is that price-fixing is impossible . . . yet we run up against instance after instance where for a long time at least seemingly human beings do succeed in fixing prices . . . If you establish

the conditions to make it possible for that program to work out, of course it works out."

But, in the opinion of the C.A.B., if price-fixing is experimented with, it should be only under complete government supervision, and as an incidental part of a general scheme of rehabilitation of an industry.

THE OPEN-PRICE SYSTEM

But minimum price-fixing played only a small part in the whole range of American industry operating under code. Actually more significant were various devices used separately or in combination to establish directly or indirectly some form of price control or to bolster up an already existent system of private control. A business man was reported by Mrs. Rumsey, as saying in this connection that "such regulations if driven to ultimate perfection would need only two more rules to make them complete. The first would add a section to every code compelling consumers to buy the goods. The second would set forth a scheme for giving them the money with which to buy."

The ingenuity of the consumer advisers was at times taxed to the utmost to uncover some of these devices skillfully concealed in code provisions; and even when uncovered it was not always possible to say in advance whether in the particular industry under consideration the use of a proposed device would result in undesirable price control. It was not until experience provided the answer that the C.A.B. could take a stand on some issues. And the difficulty of getting information on the operation of code provisions was very great. The N.R.A. was not able to get adequate information from industries, as a whole, and the limited staff of the C.A.B. could study only a few industries in any detail. Much of the data obtained by the Board came from the large purchasing agents, who found an increase in the frequency of identical bids and obvious evidence of collusion on public contracts in different parts of the country.

The N.R.A. price hearings of January, 1934, and January, 1935, provided a great volume of evidence on this point. Some of the most sensational evidence was given at the Senate Finance Committee hearings in March-April, 1935, particularly that part of the testimony given by Mr. Joseph Nicholson, purchasing agent for the City of Milwaukee relating to the purchase of fire hose for the city. In bids for the contracts, 18 persons or concerns submitted uniform bids on two specifications, 15 on one specification, and 10 on another specification; one bidder submitted lower bids and got the contracts. Thereupon, the Secretary of the Code Authority of the Mechanical Rubber Goods Division of the Rubber Manufacturing Code, who was also Secretary of the Rubber Manufacturer's Association, and in this instance was acting in the latter capacity, warned every fire hose manufacturer not to supply fire hose to the successful bidder to fill the order. The successful bidder in the Milwaukee case was well within his legal rights under the code, and the Secretary of the Code Authority in issuing his warning said that he was not acting in his official code capacity. But was this clear? The Federal Trade Commission had already been notified of the case by the City of Milwaukee; but the members of the Senate Finance Committee were much agitated by the disclosures and Dr. Blaisdell was asked why the matter had not been referred to the Department of Justice—a step which, as Dr. Blaisdell pointed out, the C.A.B. had no authority to take.

From the evidence collected in these various ways, the C.A.B. developed a strong opposition to the "concealed price controls" established under many of the N.R.A. codes, and particularly to the "open-price" system. In a formal resolution of April 19, 1935, the C.A.B. pointed out that the open-price system as it existed before N.R.A. was, generally speaking, a voluntary method of reporting prices of goods sold, and summaries of the reports were circulated to members of the industry, primarily as a means of getting more accurate information on the state of the market. The courts had frowned

upon attempts to establish a system for reporting price quotations for future sales (known as "price filing"), instead of prices of past transactions (or "price reporting"). They had also opposed identification of particular buyers and sellers, since such data might be used to bring pressure on low-priced members of an industry to change their price policy. Provisions in a large number of codes under the N.R.A., however, had made possible the development of a system of price filing and the identification of buyers and sellers. Moreover, a "waiting period" was usually provided for before the price as filed became effective, or within which the filed price could not be changed. This new system of price filing when combined with a provision prohibiting sales below "individual costs," was used in some industries to establish and maintain a high price level. This is illustrated by a letter³⁵ written by the secretary of a code authority to a firm whose filed prices were lower than was considered desirable by most of the members of the industry:

Your filed prices were roughly 10% less than those filed by your competitors. In view of their experience in the manufacturing of a similar grade, they feel it doubtful that you could justify such prices. Consequently, I feel sure that you will want to revise your prices so that they will bear a closer relation to those of your competitors. They pointed out that in the event you found yourselves unable to cooperate, it was the opinion of some of the members that they might have to resort to procedure provided . . . by the code. Under the provision a member may complain to the Code Authority in regard to your price schedule. This will lead to an investigation to ascertain whether this price can be justified. . . . Such procedure is of course unpleasant and costly. I am sure this matter can be straightened out without resorting to any such action. It was pointed out that in the event the investigation proved that this price schedule could be justified on the basis of your own cost, the members would then be forced to meet your price. This would then destroy your existing competitive advantage and merely serve to lower the existing price structure to no avail.

³⁵ Quoted by Dr. Keezer in his address at Cornell, April 19, 1934, p. 9.

As a result of the evidence presented at the N.R.A. price hearings in January, 1934, General Johnson agreed to "stay" code provisions for open-price systems in so far as they required waiting periods before price changes, and he authorized an N.R.A. staff inquiry into the general effect of open-price systems on prices. The C.A.B. participated in this inquiry, its Price Section being made responsible for a study of the working of open-price provisions under the codes.³⁶

In its report, submitted in April, 1934, the C.A.B. stated that the outstanding conclusion to be drawn from its study was that the effects of open-price systems differed according to the circumstances in which they were operated, the methods of administration, the nature of the code authority, the nature of the product, the nature of the market and their combination with other control devices. In one industry the "open prices" had facilitated collusive price-fixing and in another competitive price cutting. There was evidence in certain cases of pressure being exerted against low-price enterprises to raise their prices, in some cases by the code authority itself, in some by individual members of the authority, or again by private members of the industry, and the kind and degree of pressure varied from genial dinner parties to threatening letters. The evidence suggested that collusive price-fixing was attempted in a substantial number of open-price industries, in industries in which there was no evidence of the use of coercion as well as in those in which coercion was used.

The most impressive evidence of this kind was obtained from reports on bids for public contracts when the bids were identical. The C.A.B. report stated that in the case of 46 codes, there was distinct evidence that the open-price systems had tended to facilitate the establishment of identical prices. It was suggested that much of this uniformity did not exist in pre-NRA days. The report explained that much of the material collected was fragmentary, partly due to lack of cooperation

³⁶ See above, p. 48.

by industry, but it was sufficient to indicate that prices were collusive in 69 industries.

Perhaps the major argument advanced by industry in favor of the open-price system was that it would bring price competition into the open, as the name implied, and disclose instances of unreasonable price practices, *e.g.*, where powerful buyers were clubbing weaker sellers into unfair price bargains. The C.A.B. report stated that this not unwholesome purpose seemed to be partially achieved, for in most of the open-price codes the prices had been so filed that it would be difficult or impossible to offer special favors without violating the code. However, certain open-price systems had been so constructed that they failed to provide guarantees against discrimination.

On the value of the price reporting system as a source of price information (which admittedly was very much needed), the C.A.B. report stated that the systems established under N.R.A. codes had conformed only partially to the two requirements of a good system of information—namely, that the facts be disclosed without distortion and that they be equally available to buyers as well as sellers. In certain industries, although the code specified that buyers should receive information, the procedure subjected buyers to difficulties not met by sellers, and so on. And in some instances only the immediate members of the code authority had access to the information, which gave them an unfair competitive advantage.

The C.A.B. report recommended that open-price systems should be revised to eliminate abuses, but not abolished without further experiment. The revisions suggested were that open-price systems should be required to provide true publicity on prices, *e.g.*, the code authority should be forbidden to withhold or delay making public any price information; that all price information available to members of the code authority should be circulated to members of the industry; that all price information distributed should be available simultaneously and equally to all members of the industry, to its customers, and to the Government. The report further recommended that

the code authorities should not be permitted to exceed the powers given by their codes over terms of sale; that waiting periods should be retained, if at all, only under proper safeguards; and that proof of collusion or coercion promoted by an open-price system should automatically suspend the system.

The C.A.B. report was not made public at the time, but it was part of the record used by General Johnson and his advisers in arriving at N.R.A. policy on "open-price systems." The important N.R.A. price policy memorandum No. 228,³⁷ included a statement of official policy on open-price provisions for future codes. This provided, *inter alia*, that open-price systems should be permitted where desired by an industry, under conditions requiring the compulsory reporting of prices, both actual and quoted, to a designated agency; that sellers and buyers might be identified in the reports; and that the reports were to be distributed to members of the industry and to customers willing to pay for the service. A waiting period within which prices were not to be changed was prohibited, except in special cases which called for a departure from policy; but a period of 48 hours' notice might be required to permit the distribution of information. No member of the industry was to enter into any conspiracy to fix prices and there was to be no intimidation.

This declared policy of the N.R.A., however, related only to future codes or code amendments, and, as most industries were already under code, it had very little actual effect. At first the C.A.B. pressed to have the "open-price" provisions of No. 228 made effective, because they eliminated the waiting period, though they fell short of the C.A.B. position in other respects. But as the result of further experience with the operation of open-price systems, the C.A.B. formed the opinion that the policy outlined in the price memorandum could not correct the dangers and abuses that had developed from open-pricing, particularly by permitting the identification of particular parties to a transaction.

³⁷ See above, p. 76.

This general position taken by the C.A.B. was subject to modification in particular cases. In the clock manufacturing industry, for instance, the Board supported the Advisory Council in favoring the introduction of an open-price system of the No. 228 model, on condition that the industry made its open-price reports available to buyers as well as sellers. The main object was to check discriminatory practices, which prevailed in this industry. Distribution was partly through mass distributors, chain drug stores, and so on, and partly through jewelry outlets—some concerns using one method, some another, and some both. One concern gave large discounts to mass distributors, another protected the jewelry outlets and refused to give mass distributors any concessions, but the evidence seemed to show that in the main the amount of discount was largely a matter of buying power. Under such circumstances the C.A.B. thought it wise to have an open-price system, providing the information was made available to customers. This condition, however, the industry rejected, while pressing hard for open-prices to members.

In a decision on January 31, 1935,³⁸ the Advisory Council explained that the heart of the problem in the clock manufacturing industry lay, not so much in the multiplicity of channels of distribution, as in the fear of the industry that the large buyers would press to the utmost for extension to themselves of any price advantage they saw going elsewhere and of which they had not previously been aware. The industry pointed out specifically that if all their price lists to all jobbers and chain stores were open to the chain stores, the latter would insist not only on as low a price as any jobber was given, but on a lower price because of quantity purchases. Moreover, many of their outlets were assemblers or distributors of competitive imported products and they feared that open-prices for customers would place in the hands of the importers just the vital information they needed to make a successful raid on the domestic business.

38 A. C. Decision No. 163, 1935, p. 232.

Nevertheless, the Advisory Council recommended that an open-price system for the industry should not be approved unless the price information was made available to customers. According to N.R.A. policy, the Council pointed out, "the obligation of distributing prices to customers is the responsibility that goes with the privilege of a free exchange of prices among sellers . . . Moreover, the granting of the industry's petition would be a precedent for other industries who would thereby provide themselves with a perfect stage-setting for price collusion." Furthermore, said the Council, it would put the Administration in a rather bad ethical light with wholesalers: "One of our arguments against their eagerly sought differential has been that the wholesaler does not exist unto himself alone but is dependent in a very lively sense upon manufacturers on the one hand and retailers on the other; that under such circumstances one of his principal hopes of improvement through N.R.A. would be the suspension of discriminatory pricing above and below him, the means to this end being primarily full price publicity. After resorting to this kind of persuasion, it would be rather shabby of the administration to grant to manufacturing groups freedom from such full price publicity on the grounds among others that they would be embarrassed by exposure of their discriminatory practices."³⁹

In his testimony at the Senate Finance Committee hearings on N.R.A., in March-April, 1935, Dr. Blaisdell gave a considerable amount of attention to this question of open-pricing. At that time there were 89 codes embodying open-price provisions, though a number of these had not been put into operation. In summarizing the C.A.B.'s final position, he said: "We have no objection to what open-price reporting was originally intended to be—price reporting that will furnish information on competitive prices but will leave them competitive . . . In general we are fundamentally opposed to the device as used under N.R.A." In a resolution on April 19, 1935, the members of the C.A.B. formally endorsed this position taken by Dr. Blaisdell.

³⁹ *Ibid.*, p. 236.

PRODUCTION CONTROL

As part of the price control machinery, many codes contained provisions for limiting production, either by allocating output among different enterprises, limiting the number of machine hours or the period of plant operation, or restricting the setting up of new plant or machinery.

In general, the C.A.B. opposed plans to restrict production, and so to stabilize the existing standard of living. "The evidence is conclusive," the Board stated in its 1935 memorandum on revision of the National Industrial Recovery Act,⁴⁰ "that the people of the United States do not have and never have had an average standard of living high enough to justify complacent acquiescence in any program which restricts production." The desirable social end is "increased production at lower unit costs and consequent increased consumption at lower unit prices."

As in all questions of policy, the Board declared itself open to argument on the facts in any particular case. There might be cases of over-capacity decidedly greater than potential consumption at any level of prices and upon any reasonable scale of revived business activity. But, in such cases, production control should be clearly recognized as a temporary expedient and should be coupled with a plan for the permanent reorganization of the industry. The conditions which led to a demand for production control usually arose as a result of reckless speculative expansion, the cost of which must not be converted into a permanent charge upon consumers. In the natural resource industries, as pointed out above, the Board suggested production control as a more basic attack on the problem than price-fixing.

In all cases where production control was approved, the C.A.B. took the position that it should be directly under public supervision, and, with the exception of the early lumber code, made this a condition of its approval of production control provisions.

⁴⁰ See Appendix I.

ALLOCATION OF OUTPUT QUOTAS

The method of control by allocation of production quotas usually took no account of the relative efficiency of different concerns and so in the opinion of the C.A.B. was generally a means of making the consumer pay for maintaining inefficient concerns in production.

A member of the C.A.B. staff, George B. Haddock, made a detailed study of the problems that arose in allocating output in the mackerel fishing industry and reported his findings at the N.R.A. Price Hearings in January, 1935.⁴¹ Under the Atlantic Mackerel Fishing Industry Code, the plan was to increase mackerel prices by limiting production. The catch of mackerel was to be limited to the point where it would balance consumer demand at a price sufficient to meet the cost of production. If experience showed that consumers would buy X pounds of mackerel at Y cents per pound, Y being equal to the cost of production, then the catch would be limited to X. The value of Y had then to be determined. Several years previously, the U. S. Tariff Commission had made an estimate of 3 cents per pound, and the Executive Committee of the Mackerel Code accepted that figure, and on that basis estimated consumer demand at 700,000 pounds per week. A limit was put on the number of pounds that any boat could catch and sell on any single trip. The industry began operations under this regulation on June 9, 1934.

But difficulties immediately ensued. Production dropped and the price rose, but not enough to compensate for the fish that were left in the sea: and as a result there was a decrease in the total value of the catch and therefore in the return to boat owners and fishermen (who work on a share basis). Boats had usually been making only one trip a week, but now, since no limit had been put on the number of trips made, many decided to make two or three short trips a week, to compensate for the lower total return. Production in the week ending June 30,

⁴¹ See N.R.A. Hearings, S.F.C., 1935, p. 883.

1934, reached a level of one and a quarter million pounds, and the price was 2.2 cents per pound. The Executive Committee of the Code then tried dividing the boats into "squadrons," each of which was permitted to fish on alternate weeks, though still no restriction was made on the number of trips in any week. This also proved ineffective, and production and price stayed at about the same level. Regulations were again revised, the estimate of consumer demand increased, and the amount of mackerel which could be landed by any boat during one week was limited. Production fell to 445,000 pounds in the week ending August 4 and the price increased from 2.4 cents to 3.8 cents, and this situation continued approximately the same during the entire season. But wherever production was reduced to a point where prices rose above 3 cents per pound, the return to fishermen fell below the weekly return received before the program commenced. "The effect of the production limitation program," concluded Mr. Haddock, "was to hurt the fishermen (because of decreased income) and to hurt the consumer (because of higher prices and a smaller available quantity of mackerel). The only ones to benefit from the code program were the mackerel themselves. This was not the intent of the proponents of the code."

Meanwhile, the Executive Committee of the Code had petitioned the Administration to establish minimum prices below which no mackerel could be sold, but this petition was not approved, and all control regulations were rescinded in October, 1934. The Administration representative on the Executive Committee of the Code said that much of the difficulty arose from the delay in getting administrative approval for changes in the regulation aimed at meeting the changing run of fish and changing market conditions. In Mr. Haddock's opinion, however, "whatever the merits of the criticism of administrative delay and supervision, it is believed that the facts of the case conclusively show that the program would not have worked had the Executive Committee been given full power to act without Administrative approval."

PRODUCTION CONTROL BY CAPACITY LIMITATION

About 20 approved codes contained provisions for limiting production capacity in an industry, a number of other industries having sought this power without success. The C.A.B.'s most intensive study of the operation of such provisions was in the ice industry.

In 1934 the ice industry, speaking generally, consisted of a large number of relatively small concerns operating in a series of local markets throughout the country. Establishments in one marketing area frequently invaded neighboring areas for increased business. There were price wars and threats of price wars; on the other hand, there were many price agreements in a particular market.

In March, 1935, Mr. George B. Haddock of the C.A.B. staff, made a detailed analysis of production control in the ice industry code as it had operated for nearly a year and a half; this was followed by a supplementary report in April. Under the ice industry code the erection or operation of any new or additional ice producing or storage facilities was prohibited unless the Administration was first satisfied that "public necessity and convenience requires such additional ice-making capacity, storage or production." A supplementary provision prohibited any member of the industry from "dumping" his surplus ice in neighboring markets.

The administrative procedure followed at first in determining "public necessity" was for the applicant wishing to construct new capacity to apply for permission to the local "committee of arbitration and appeal" set up under the code (the committee being composed of members of the industry). The committee heard evidence and then made recommendations to the code authority (also composed of members of the industry, but representing the industry as a whole, rather than purely local interests), which transmitted the case to the N.R.A. with a summary of the evidence and its own recommendations. "Naturally," said the Haddock report, "in many cases, the

applicant's side of the matter was somewhat neglected in the shuffle." Later the procedure was changed and the N.R.A. took a more active responsibility. Administrative orders for the conduct of hearings were prepared and two field representatives were sent around to hold hearings on all applications about which there was controversy, though in most cases members of the committee of arbitration and appeal sat on the bench with the field assistant deputy or else cross-examined witnesses from the floor. As potential competitors, they were likely to adopt a procedure which embarrassed the applicant. In pointing out the administrative problem involved, the Haddock report said it was impossible for two deputies, however capable, to gather sufficient information to enable the Administration to act intelligently and properly upon hundreds of applications for permits to construct new capacity.

Apart from this procedural problem, there were the basic problems involved in making the necessary determination on each application. Was the existing capacity of ice plants in a locality adequate? How could adequacy be determined? What volume of consumption could reasonably be anticipated? Would it increase with additional purchasing power, or decrease from use of more mechanical refrigeration? How far were intra-industry group disputes involved in a particular controversy? Was the operation of existing plants controlled by monopolistic agreements? Were prices reasonable and proper? Was the service satisfactory? Were existing plants operated at a profit or a loss and how much? All these and other vexing questions had to be considered before a determination was made. The fact that formal administrative action was taken on only one-tenth of the total number of applications received indicates the difficulties encountered.

In discussing the effect of the ice code on prices, the Haddock report referred to an argument advanced by members of the industry and some N.R.A. officials, that production restriction was as much to the benefit of the consumer as to members of the industry, since the average cost of ice produced in a plant

running at full capacity was much lower than in a plant running at one-third capacity. But, according to the Haddock report, whatever the effect of restriction on cost, actually it had led to an increase in price. Thus, the argument ran, "Not only have ice prices increased throughout the country, but members of the industry, including members of local committees of arbitration and appeal, appear to believe that the primary purpose of the Ice Code is to increase prices. It appears obvious that there is an irreconcilable conflict between the contention on the one hand that the code will tend to lower prices by resulting in more efficient production at nearer fuller capacity with lower unit production cost; and the contention on the other hand that increased prices are proper, justifiable and desirable results of the code."

There was evidence also of a widespread belief among members of the industry that the code permitted price-fixing, unofficial as well as official, and various private allocation and marketing agreements were undoubtedly made under what was believed to be the protection of the code.

In general, the C.A.B. was of the opinion that the ice industry code might ultimately result in serious damage to the industry by minimizing competition, discouraging progress in the production and sale of machinery, and in better service at lower cost to the consumer, thus opening the way to further development of mechanical refrigeration. They were also of the opinion that the ice industry code could not be adapted to proper administration, having in mind the public interest as contrasted to the private interests of members of the industry. The Haddock report continued:

The requirement that a certificate of public necessity and convenience be secured before new ice producing or storage facilities can be established, grants to the Ice Industry one of the most important concessions that can be given to industry under public utility regulation, without imposing any restriction or regulations for the protection of the public. . . . Under most forms of public utility regulation, certain duties are imposed upon the industry for

the protection of the public. Among them are the following: 1. The utility must render reasonable and adequate service, serving all comers without unreasonable discrimination; 2. For this service the utility may not charge more than a reasonable rate; 3. This service must be rendered without delay; 4. Rules and regulations governing the conduct of the business must not be contrary to the public interest; 5. Certain restrictions are placed upon abandoning the service. Under the Ice Code as it is framed at present, the Administration has no authority to compel the industry to follow any of these requirements. . . . No requirements (are made) on the industry other than specified minimum wages and maximum hours of employment.

The C.A.B. is of the opinion that the Code of Fair Competition for the Ice Industry should be amended, either by the deletion of the anti-dumping and control of production sections, or by placing the industry under proper public utility regulation. The advisability of the latter alternative is extremely doubtful, at least under the present N.R.A. set-up.

It is of interest to note that, in the two cases that came before the Advisory Council involving requests for permits to establish additional capacity, the C.A.B. assented to the recommendations of the Council made on February 6, 1935,⁴² and February 15, 1935,⁴³ that the request should be denied; the Council was careful, however, to point out in each case "that it has not examined the principle and practice of capacity control as applied to this industry, but rather the application of this code provision to a particular situation."

PRODUCTION CONTROL BY MACHINE-HOUR LIMITATION

Another important method of restricting production was by limiting the number of hours a plant might operate, usually in terms of "machine-hour limitation." The C.A.B. took the position that general restrictions on the number of machine-hours worked in any plant had the effect of forcing efficient

⁴² A. C. Decision No. 166, 1935, p. 244.

⁴³ A. C. Decision No. 171, 1935, p. 261.

producers to follow the pace of the less efficient to the disadvantage of consumers.

This issue was complicated, however, by aspects other than those of production control. Organized labor, for instance, was particularly anxious to get rid of the third, or "graveyard," shift and also to regularize employment, and associated with this was the general problem of regularizing industrial activity.

Some of the problems raised by machine-hour limitation were illustrated in a case brought before the Advisory Council with reference to an application for exemption from the provision of the Upholstery and Drapery Code that no loom should be operated for more than two shifts of 40 hours each per week. Because of a recent rapid upturn in the automobile industry with a resulting increased demand for upholstery fabrics, the Collins-Aikman Co., the leading manufacturer of pile fabrics for automobile upholstery, applied for an exemption from this code provision, so that they could operate a third shift. In meeting the demands of the automobile industry, the pile fabric manufacturers were in competition with the wool fabric industry operating under the wool code, and the Wool Code Authority objected to the Collins-Aikman application. The wool industry, which was also working under a two-shift system, objected not only for immediate competitive reasons, but also because they feared such an exemption might undermine the two-shift system, and work against regularization of production and employment. The application was also opposed by the Cotton Textile Code Authority which, while not directly affected, felt also that the two-shift system and the principle of machine-hour limitation were put in jeopardy.

The Advisory Council reported on February 7, 1935,⁴⁴ that the Collins-Aikman Co. showed "little patience with a theory that would legislate the business away from them and back to the manufacturers of products which have largely been dis-

⁴⁴ A. C. Decision No. 168, 1935, p. 250.

placed, and which, in the public judgment, are inferior for the purpose." The Council deplored the irregular productive activity in the automobile industry which hindered efforts at regularizing production in dependent or contributory industries, but took the realistic position that nothing could be done about that in time to affect the case before them. The issue was debated at length in the Council, which finally made general and specific recommendations to the National Industrial Recovery Board; in these recommendations the C.A.B. concurred.

The Council recommended that exemption from machine-hour limitations be granted in the following two circumstances: (a) When a failure to grant the petition would impose a definite hardship on both buyers and sellers, and would tend to check the increase in production; and (b) when no conspicuous idle capacity appeared in the immediate competitive field (*i.e.*, among all producers of the same or essentially similar types of product for sale into the same market). It was also recommended that when an exemption was granted, it should be on condition that permission to operate a third shift or in any other way to exceed the limitations imposed by a particular code was granted only for the purpose of filling actual orders, not for inventory; that such exemption should be in effect only when and so long as all available capacity of the producer was in use at the maximum permitted by the code; that the use of such exemption in such a way as to allocate an undue proportion of the extra production to low-wage areas should be considered as a reason for terminating the exemption; and that the same exemption should be available on the same condition to other producers in the same competitive field (in this case for example to wool fabric as well as pile fabric producers of automobile upholstery).

The application of the Collins-Aikman Co. for exemption from machine-hour limitation was considered by the Council to fulfill these conditions, and the Council recommended that the application be granted for a 90-day period. The Council added that it would like to see exemptions of this sort so conditioned

as to discourage the use of the graveyard shift, and encourage maximum production in regular shifts, and it urged the N.I.R.B. to appoint a committee to consider this problem further and suggest within several weeks a method or methods for accomplishing these latter purposes.

A suggestion made in this case by the Collins-Aikman Co., and indeed one which they supported consistently during the code-making process, was that production control should be achieved not by machine-hour limitation, but along the lines of control of inventory. This suggestion was not fully considered by the C.A.B., but in the personal opinion of Dr. Corwin Edwards, Technical Director of the C.A.B. staff,⁴⁵ it might be a constructive approach to industrial problems:

It seems to me we have just begun to touch the possibilities of inventory control. It has been recognized for some time that one of the easiest roads by which an industry approaches trouble is for a series of business men, operating separately and without knowledge of what the others are doing, to pile up speculative inventories and then find themselves overloaded. That is not only bad business; it is bad social accounting. It is bad use of resources from the consumer's point of view. . . . Statistics as to the size of inventories need a great deal of development. There are also one or two codes, to which I look with great interest as experiments, in which it is provided that a member of the industry shall regard such and such a percentage of his past sales over such-and-such a period as his maximum inventory, and that when his inventories exceed that figure he must within so many months get them below it again.

Such a provision seems to me to have merits of flexibility, such as some of the other proposals for stabilization do not have. A man is free to expand his share of the market if he is in a growing business. He is free, if he is in a hopelessly inefficient and obsolescent business, to get gradually driven out of the market. . . . I should like to see more experimentation along this line.

⁴⁵ Address before National Association of Cost Accountants, June 28, 1934.

CONTROL OF DISTRIBUTION

Another set of problems arose in connection with attempts made through code provisions to control the distribution of goods. About 240 of the approved N.R.A. codes contained provisions affecting distribution. Some codes made provision for controlling the price at which the product was sold at different stages of the distributive process, or to different classes of customers as *e.g.*, jobbers, wholesalers, large chains and department stores, and small retailers. Other provisions were aimed at controlling the channels through which the product passed to the ultimate consumer.

Some codes, with a view to simplifying or "regularizing" the distributive structure, defined different types of customers, and prescribed the terms that each type might receive; some set the different discounts which might be given for different types of services; some prohibited or limited quantity discounts, putting large and small buyers on a basis of equality; some gave the manufacturer power to set the price to the ultimate consumer though he actually sold to wholesalers and retailers who might wish to charge a different price; some restricted sales areas, so that businesses in neighboring places could not compete; others forbade sales by manufacturers to ultimate consumers, forcing goods to travel through the regular wholesale and retail channels; some forbade such practices as consignment selling, on which many small distributive agencies partly depended; others provided standard contract forms which tended to affect adversely the "irregular" buyer, and so on. But despite the diversity in the provisions, the object generally speaking was either to bolster up a price structure, or to protect different functional groups of distributors, particularly the old-type wholesaler, from competitive pressures. The drive for code control of distribution came in some instances from manufacturers, and in others from the distributors, or from members of both groups protecting a mutual interest.

So important became this whole problem of code regulation of the distributive process, that special hearings were held by the N.R.A. in March, 1935, for a public discussion of the issues involved. The Consumers Advisory Board was thus called upon to express a considered point of view on the subject in a general way, as well as on particular issues as they arose in code hearings and in connection with cases brought before the Advisory Council. Two statements were presented by Dr. Corwin Edwards on behalf of the Board at the March, 1935, hearings, a general statement on "Code Revisions Concerning Distribution," and a second statement on "The Differential in the Wholesale Code."

MANUFACTURER-CONTROL OF DISTRIBUTION

In efforts made by manufacturing groups to control distribution, the aim was frequently to maintain a price structure. If a code provided for minimum price-fixing, the manufacturers found themselves almost inevitably driven to try to extend control over distributors. If a manufacturer sold both to wholesalers at a discount, and also direct to retailers, he could not maintain a uniform price to retailers if the wholesaler began to cut his prices; the wholesaler must either agree to add a minimum "mark-up" to the price at which he bought from the manufacturer, or the manufacturer must dictate to him the actual price at which he should sell to retailers, that is, the manufacturer must establish the resale price.

Early in 1934 N.R.A. official policy developed a hesitancy about allowing provisions for resale price maintenance to be incorporated in future codes, but some industries, already under code, argued that in their case such a provision had become necessary to implement minimum price provisions already allowed and that it should be granted as a matter of good faith.

At the N.R.A. distribution hearings in March, 1935, Dr. Corwin Edwards illustrated this tendency to establish resale price maintenance by developments under the business furniture code. The case of the Business Furniture Industry had

been outlined by the Advisory Council in a decision dated January 24, 1935.⁴⁶ The industry had sought unsuccessfully to prosecute the Macy Co., manufacturers in Grand Rapids, on the grounds that through a dealer, in this case, John Wanamaker Co., they had distributed industry products to users contrary to published prices filed by the manufacturer under an open-price system—the facts being that Wanamaker Co. had sold Macy Co. furniture to the New York City authorities at a price below that filed by the manufacturers. New regulations submitted by the industry to N.R.A. provided for a resale price contract between the manufacturer and dealer in which the dealer (who was receiving a mandatory discount of 36% under the code) would undertake not to sell below the manufacturers' price. It was claimed that those manufacturers who sold both direct and through dealers would have to revise all their prices downward to meet dealer competition, if they could not be assured of resale price maintenance on the part of the dealers, and that this would lead to a breakdown of the whole code structure. A number of dealers supported the industry in this move for extended powers, because they were holding large stocks and were afraid of a price collapse. The Advisory Council sidestepped a decisive recommendation on the issue, suggesting that unless the problem of this industry could be adequately discussed at the proposed March hearings, special hearings on the code should be arranged.

In general, the C.A.B. opposed all proposals for resale price maintenance, and particularly when it was supporting an industry price-fixing structure. In the early policy guides such provisions in codes were said to be undesirable. Experience strengthened the Board in this point of view. A notable exception was made in the case of the Booksellers Code in which a limited plan for resale price maintenance for six months was approved, but this inconsistency in policy was due to peculiar circumstances.

46 A. C. Decision No. 160, 1935, p. 217.

The interest of manufacturers in extending their control over the distribution of their product was not limited to the direct maintenance of a uniform price-structure. They were frequently concerned to devise methods for maintaining their influence over distributors, particularly when traditional methods of distribution were being disturbed by large buyers with powerful reserves.

In its statement on "Code Provisions Concerning Distribution," for the March, 1935, hearings, the C.A.B. declared that as producing units had grown in size, the large manufacturer had been increasingly able to dominate his independent distributors. By national advertising he had impaired their control of the market's good will; by financial strength he had established superior bargaining power; and by the discovery of direct selling techniques, he had threatened their very existence. He had joined his fellow producers in group agreements which distributors could seldom equal. Then had come the mass buyer, using tactics similar to those of mass producers. The mass buyer demanded price concessions. He could not be forced to observe arrangements by which manufacturers controlled resale prices. Worst of all from the manufacturing point of view, the independent distributors then demanded prices similar to those given the mass buyer and "thereby," to use the words of the C.A.B. statement, "the docility of the buying market is disturbed and the integrity of price control by producers is shattered. Thus the mass buyer may become the key to the whole market. Prevent him from getting price concessions and the producers can control prices; permit him to get price concessions, and an elaborate structure of uniform sale prices and resale prices cannot be maintained. The big producer and the closely knit producing group have often been prominent in the attack upon big buyers and the charge of monopolistic buying has often come from groups who themselves have been repeatedly accused of monopolistic selling."

The statement emphasized the fact that the C.A.B. was not defending the monopolistic buyer, nor denying that big buyers

may secure unfair privileges. The Board was sympathetic to the elimination of bargaining abuses by buyers as well as by sellers but not by means which bolstered price control. The immediate dangers of monopoly did not lie in the distributive field "where," again to quote the statement, "the struggle of many units and of diverse methods is so evident, but in various manufacturing fields in which the small number of units, close understandings, and codes embodying ambitious price agreements express the decline of competition."

A statement prepared by Leander Lovell of the C.A.B. staff for the N.R.A. Price Hearings, January, 1935, described an attempt made to regulate distribution in the plumbing fixtures industry, with a view to maintaining manufacturers' control. In this case an attempt was made to establish a vertical monopoly by agreement among manufacturers, recognized wholesalers and retail plumbers with the functions of each group closely limited. There were three codes, one for each of these groups, which together made a complete pattern of control. A manufacturer must file his prices, customer lists and discount schedules. If he operated wholesale branches he must separate his manufacturing and wholesaling accounts and sell to the retail plumber at the required level; and neither he nor his branches could sell to the consumer. The wholesaler in turn was to sell only at prices suggested by the manufacturer and only to certain classes of customers. The plumber in his turn was to receive suggestions about prices for his sales to the ultimate consumer. A further complication was introduced in the prohibition of sales of "seconds," that is, defective goods, to prevent violation of the suggested prices by selling "firsts" as "seconds."

The scheme, if it had worked, declared the Lovell report, would have kept out "new factors that might not so readily conform to fixed ideas concerning prices and distribution."⁴⁷ It was aimed in part at the "disruptive" influence of the mail-order houses, and the manufacturing concerns who found it

⁴⁷ N.R.A. Hearings, Senate Finance Committee, 1935, p. 886.

desirable to sell to them. Unsuccessful attempts to boycott these concerns had been made before N.R.A. days. The scheme did not work, partly because the mail-order houses resisted control, partly because the sale of "seconds" could not be prevented, and there were other contributory causes.

The mail-order houses and the manufacturers supplying them did not keep the rules. What was more important, instead of raising their prices sharply as the rest of the trade did in 1933, they began to lower them. The Lovell report stated that, as a result, the largest manufacturer in the industry, in order to retain his proportion of the business, started out to meet the competition of the mail-order houses and to beat them at their own game. Further, the open-price filing system provided for under the code disclosed the price concessions that were being granted by small manufacturers selling non-branded wares, and the large nationally known competitors soon took advantage of this information. This led to strained relations between small and large members of the industry. Moreover, other elements in the code, such as prohibition of sales by manufacturers to consumers, of consignment sales, of quantity discounts over 5% "are of the same stripe—designed to beat into a dead level of uniformity any tendencies toward marketing vision and initiative—and about these, too, the files of the deputy are replete with letters of dissatisfaction and complaint." The total result of the code in operation, according to the Lovell report, was that the industry reached a new low, "not only in prices but in morale."⁴⁸

The C.A.B. had consistently opposed the rigid marketing system set-up in the plumbing codes, and after studying its operation were convinced that the plumbing fixtures industry would be well rid of the restrictive devices by which it "had sought to consolidate its past position at the cost of denying itself all chance of growth and development." These trade practice provisions were later removed by amendment with the consent of the industry.

⁴⁸ *Ibid.*, p. 888.

THE WHOLESALE DIFFERENTIAL

In addition to the drive by manufacturers, or certain groups of manufacturers, to secure more effective control over the distributive process, there was a drive by different groups of distributors, especially jobbers and wholesalers, to protect their operating margins from competition by new and more direct methods of marketing. Many old-type wholesalers were being squeezed out by the practice of manufacturers selling direct to retailers and some retailers were suffering from an increased tendency for manufacturers and wholesalers to sell direct to large users. This intensified all competitive pressures in distribution. For instance there were bitter conflicts in price policy between general and specialty wholesalers. An example of this was the complaint made by the paper distributors that wholesale grocers were using paper products as loss leaders to the retail trade—this was the subject of an Advisory Council recommendation, February 15, 1935.⁴⁹ There were also conflicts between established dealers and truckers and so on. But the main problem arose from the increasing tendency to direct selling and buying.

In a statement on December 22, 1934,⁵⁰ the Advisory Council pointed out that in recent years there had come to be two channels of distribution existing side by side, one direct to the retailers from the manufacturer, and one routed through the wholesaler. Frequently there was little difference in the quantities ordered, and the large retailer purchasing direct from the manufacturer might obtain goods at the same price as the wholesaler. The result was that the goods passing through the wholesaler's hands found it difficult to compete with those purchased directly. The wholesaler was thus placed under terrific pressure to reduce his selling price, which made his position exceedingly precarious.

The remedy usually proposed through the codes was either to classify distributive functions and buyers in such a way as

49 A. C. Decision No. 173, 1935, p. 264.

50 A. C. Decision No. 140, 1934, p. 159.

to prevent direct selling or to forbid the direct seller to give any price advantage to the retailer. Limitation on price concessions by the direct seller was usually provided for through the establishment of the "wholesale differential."

The plan for the wholesale differential or the "mandatory functional discount" can perhaps best be understood from the relevant provisions in the code for the general wholesale trade, and the 23 codes supplementary to this basic code. Arguments for and against these provisions were stated with admirable clarity by the Advisory Council in its decision of December 22, 1934, and, as pointed out above, they were the subject of a special statement by the C.A.B. at the N.R.A. hearings on distribution problems, March, 1935.

The plan, basically, was to secure to wholesalers an operating margin that was "fair and reasonable," by requiring manufacturers in direct sales to retail outlets to add the established differential to the price paid by wholesalers. The margin thus secured to wholesalers, was not based, even nominally, on individual costs, nor on the average cost of the wholesale trade, but was to be "fair and reasonable" as determined by the Code Authority, subject to the approval of N.R.A. This operating margin was to be protected not only in sales to ordinary retail stores, but in sales to cooperative organizations, chain stores, mail-order houses, and large industrial users. It was to be protected from competition within the wholesale trade itself in spite of the fact that wholesalers differ in functions performed, in credit responsibility, operating efficiency, advantages of location and promotional aggressiveness. Only those producers who could dispense entirely with the use of wholesalers in distributing their products were free from these requirements. Moreover, the differential provisions in the Wholesale Code not only permitted but required the use of the boycott against manufacturers who did not accept this control of their sale prices.

Under this guarantee of an operating margin, the Advisory Council pointed out, wholesalers would become a highly

privileged class. The principle involved was not that products should pass to the buyer by whatever channels would distribute them most economically, but that products should pass to the buyer at the same price, regardless of the channels by which they were distributed. In spite of a widespread belief that distribution was too costly and that distributive efficiency must be greatly increased, these measures promoted rigidity rather than experiment. Moreover, further regulation would be required for a fixed mark-up by wholesalers, or else they would be able to establish prices to retailers which a manufacturer could not meet on his own goods in direct sales.

The C.A.B. consistently opposed the idea of functional differentials. In the policy guides to advisers, the Board stated that the effect of such standard discounts was to freeze an existing distributive system by insuring the continued existence of all types of distributors now found in it. When dealing with provisions of this type, advisers were asked to urge the substitution of systems of discount based upon quantity or other characteristics of the transaction itself, rather than upon the characteristics of the buying organization.

In its memorandum on code revision, February, 19, 1934, the C.A.B. agreed it was desirable to prevent very large distributors from clubbing unreasonable discounts out of manufacturers, but the dangers of artificially bolstering a system of distribution through a scheme of fixed differentials seemed to them to outweigh any advantages this device might afford. They suggested instead that buying abuses could best be handled by an administrative agency prepared to deal promptly and decisively with complaints of price chiselling by very large buyers rather than by a general system of price differentials. "Our experience with complaints," they said, "indicates the producer is much more likely to have facilities for registering an effective complaint against a buying monopoly than the ultimate consumer is to have the necessary information and

facilities for complaining effectively against an excessive distributing charge.”⁵¹

This argument was emphasized in the Board's statement on the wholesale differential presented at the N.R.A. distribution hearings, March, 1935. “The power to establish wholesale differentials and to enforce them by boycott,” the statement declared, “is too dangerous to be embodied in law merely because it will strengthen the position or express the moral sentiment of a particular business group . . . We regard as essential the flow of goods to the consumer with the greatest possible economy, and we believe that freedom to experiment with new distributive methods is essential to that end. Particularly we believe that consumer cooperatives and commercial cooperatives are valuable experiments which should not be handicapped by adverse regulation.”

The C.A.B. argued further that the network of regulations which would be needed to protect the operating margins of distributors was an evil in itself, calculated to create major administrative difficulties and still further limit competition. One regulation called for another—for instance, advertising allowances would have to be measured or forbidden or they would provide a means of evasion of the fixed differential provision. Moreover, a fixed differential took no account of the wide variety of services rendered by some manufacturers and some wholesalers. Again, what was a proper differential? A dry-goods wholesaler might handle 20,000 or more items which differed in speed of turnover, size of unit sale and cost of handling. Should there be a series of differentials? It was not feasible for the N.R.A., in the opinion of the C.A.B. “to make a complete blueprint of an ideal distributive system and to force it upon American commerce by codes; and short of that, these extensions of questionable privileges amount to no more than hurrying hither and yon throughout the business system in an effort to impose minute justice by snap judgment.

51 N.R.A. Hearings, Senate Finance Committee, 1935, p. 854.

The scale of the program is wrong, its quality is questionable, and the possibility of its abuse is great."⁵²

In answer to questions following the presentation of his statement for the C.A.B. at the March, 1935 hearings, Dr. Edwards admitted he could not offer a remedy because of the lack of fundamental information. He said: "From our point of view the field of distribution is now sufficiently chaotic that about all we could defend as sound would be experiments."

The Advisory Council substantially supported the position taken by the C.A.B. with reference to the wholesale differential.

One further aspect of code regulation of the distributive process calls for special mention, namely, the attack on cooperatives.

THE ATTACK ON COOPERATIVES

The C.A.B. did some of its most effective work on the complex problem of protecting cooperatives from discrimination under the codes.

The attack was opened in a dramatic way, almost at the beginning of N.R.A., when the oil industry included a provision in its draft code to the effect that no rebates should be paid to purchasers of petroleum products. Cooperatives operate on a rebate system. At the time there were about 1500 cooperative oil-distributing societies, most of them in the Middle West, and the number was growing rapidly. They had for the most part been supplying gasoline and oil to farmers, but more recently they had been developing in the urban areas, dealing in furnace oil and even going into the service station field. The whole oil industry was united in opposition to distribution through cooperatives, especially the dealers in the middlewestern states.

Mrs. Rumsey was deeply interested in the development of consumer cooperatives, and she personally, with tireless energy, led the fight against discrimination, making full use of her social and political influence. Dr. James Warbasse, President

⁵² "Code Provisions concerning Distribution," March, 1935.

of the Cooperative League of U.S.A., was brought on to the C.A.B. and worked closely with her. The powerful farm cooperatives of the Middle West, many of which were directly interested in oil distribution, brought pressure to bear on the Secretary of Agriculture, who was himself sympathetic to the cooperative movement. The Farm Credit Administration, authorized to make loans to cooperatives, was also directly interested. Here was one place, at least, where consumers were organized, and the full weight of the cooperative organization was thrown into the fight.

As a result of this pressure, the oil industry was forced to accept an amendment to its draft code exempting farm cooperatives and other cooperatives existing on July 1, 1933, from the provisions prohibiting rebates, so far as their members were concerned. The code in this form was approved on August 19, 1933, and was shortly afterwards transferred for administrative purposes to the Department of the Interior. But the victory for the consumers was only partial. The clause in the petroleum code exempting patronage dividends of cooperatives from the provisions forbidding rebates was specifically limited to farm cooperatives and other cooperatives already in existence. Moreover, discriminatory provisions were appearing in other codes, and there were various attempts at discrimination in code administration. Mrs. Rumsey continued the fight to protect all cooperatives from discrimination. On October 23, 1933, President Roosevelt issued an Executive Order to the effect that no provision of an N.R.A. code should prevent the payment of patronage dividends by any bona fide consumer cooperative to its members—a Magna Carta for cooperation.

But immediately a host of problems arose. There were technical questions involved which gave many a headache to the Legal Division of the N.R.A. For example, under the executive order, could cooperatives give rebates to non-members, and, if not, what would be the position in Nebraska where a cooperative association that did not pay or credit refunds to non-shareholders was not qualified for income-tax exemption?

Then the question was raised as to the status of a cooperative wholesale society. There were provisions in a number of codes, *e.g.*, salt, farm fencing, fertilizer, and others, which seemed to make it impossible for cooperatives to purchase as jobbers from manufacturers. On February 17, 1934, another Executive Order was issued providing that no code should prevent a bona fide cooperative from purchasing as a jobber from manufacturers and getting the customary discounts for purchases in wholesale quantities. Again there was a storm of controversy.

Consider, for example, the position under the food codes. Increasingly in the last few years, food manufacturers and processors had been paying "brokerage," or an allowance of one sort or another, not only to the regular food brokers, but also to mass buyers, large cooperatives, and others who did not come into the traditional wholesale category. Most of the food codes provided that no "brokerage" or similar allowance should be paid except to the regular brokers. The cooperatives argued that when they acted merely as intermediary between seller and buyer, without taking title, they performed precisely the same function as the conventional broker and were entitled to the same commission. They claimed protection under the Executive Order of February 17, 1934.

Later, on October 12, 1934, an N.R.A. Administrative Order was issued to clarify the situation. It made clear that the two executive orders aimed to prevent discrimination against cooperatives, but were not intended to bring about discrimination in their favor; it endeavored also to explain that cooperatives which acted as brokers were to be treated under the codes on the same footing as any other broker, and that cooperatives which did not act as brokers were to enjoy neither more nor less favorable consideration in respect to "brokerage" than any other trade factor which did not act as broker. But there was a great deal of misunderstanding as to the meaning of the Administrative Order, and many manufacturers and cooperatives took it to mean that code provisions restricting "brok-

erage" did not apply to cooperatives under any circumstances. And this led to further discussion.

Meanwhile, another problem had developed in connection with the definition of a "bona fide and legitimate cooperative." The Executive Order of February 17, 1934, had authorized the N. R. Administrator to determine, after such hearings and proceedings as he deemed necessary, whether, in any doubtful case, an organization was or was not a bona fide and legitimate organization entitled to the benefits and protection of the Order. On May 18, 1934, an N.R.A. Administrative Order set out a definition of a cooperative for the purpose, but on November 7, following, the Advisory Council declared that this definition was neither sufficiently clear nor sufficiently comprehensive.⁵³ It was not only a question of eliminating the pseudo and the fake cooperative. The main problem was the commercial cooperatives that were being set up by smaller jobbers or retailers. Was the commercial cooperative a bona fide and legitimate cooperative within the meaning of the Executive Orders? The definition of May 18 did not make this clear. In any case, should the commercial cooperative receive protection? This became a serious problem for the N.R.A. officials. In its recommendation of November 7, 1934, the Advisory Council urged the N.R.A. and the A.A.A. to come to an agreement on a definition "taking full account of the present status and trend in both farm and consumer cooperatives, and bona fide commercial cooperatives." It also suggested that a public hearing be held before a definition was finally agreed upon, but this suggestion does not appear to have been carried out.

On December 19, 1934,⁵⁴ the Advisory Council dealt with some of the more important questions affecting the position of cooperatives under the codes, in a recommendation on the brokerage issue in the food codes. In this recommendation the C.A.B. concurred. In the judgment of the Council, the "issues

⁵³ A. C. Decision No. 84, 1934, p. 77.

⁵⁴ A. C. Decision No. 137, 1934, p. 153A.

find their roots in the fundamental problem of adjustment to shifts in the pattern of distribution." However, "it seems to be reasonably clear that N.R.A. cannot take responsibility for arbitrarily determining the struggle in favor of one of the contending factors rather than another." The Council therefore felt they could not accept a suggestion to the effect that brokerage should be permitted to farmers' and consumers' cooperatives and denied to commercial cooperatives. In their opinion, there was much to be said for the commercial cooperative, a form of organization which enabled the smaller jobbers and retailers to combat discriminatory treatment in favor of the mass distributors.

With regard to the particular issue before them, the brokerage provisions in the food codes, the Council said it appeared to be the part of wisdom for the N.R.A. to confine its efforts to eliminating confusion and deception and to promoting the general diffusion of essential information. The Council rejected a suggestion that brokerage should be prohibited to buyers and agents of buyers, but paid to a bona fide and legitimate cooperative, including a commercial cooperative, acting as intermediary between seller and buyer without taking title. The result of such a provision, in the judgment of the Council, would be that the chains and larger cooperatives (other than those merely acting as intermediaries) would get price concessions in some form or other, and the actual discrimination would be against the smaller cooperatives, leading to further difficulty. The Council recommended that steps be taken to persuade the several food manufacturing and processing groups to withdraw the code provisions restricting brokerage, and to encourage them to use the open-price system in line with Office Memorandum No. 228, the seller filing any brokerage allowed to customers as part of his price terms. They recommended further that the Executive Order of February 17, 1934, should stand, with the understanding that there was to be no discrimination for or against cooperatives. They also urged again that an agreed definition of "bona fide and legitimate coop-

erative" should be reached, but did not indicate on this occasion whether in their judgment commercial cooperatives should or should not be included. No further action seems to have been taken on the matter.

The C.A.B. regarded the recommendation of the Council as a substantial victory for its point of view. But, throughout the life of N.R.A., the Board had to watch for discrimination against cooperatives in the administration of some of the codes, and there were frequent problems of interpretation and application. Generally speaking, however, the Board and the cooperatives were satisfied with the legal protection afforded the cooperative movement under the executive and administrative orders affecting it. As a result, a proposal to submit a special code for the cooperatives cutting across industry lines was dropped after Dr. Warbasse had put a considerable amount of work into drafting it.

QUALITY LABELLING

For the most part, the C.A.B. found itself in a defensive position, forced to oppose proposals advanced by industry. But in urging quality labels for consumer goods it played a constructive role.

Here the issue on the consumer side seemed clear, but industry was for the most part actively opposed to such a development. The nub of the opposition was the intangible equity and competitive advantage represented by various brand names, which had been steadily increasing in value as the result of promotional advertising.⁵⁵

The C.A.B. urged that, under present merchandising practices, unfair competition can come about fully as much by chiselling on quality as by chiselling on price. The consumer suffers directly from quality dilution, and more so since he is frequently unable to detect it under the existing complex technology. It is difficult in these times to judge the quality of goods bought, since the display is so varied, so highly

⁵⁵ See *Recent Social Trends*, II, 875-76.

fabricated, so elegantly and securely wrapped or canned. The quality of a product needs to be standardized as weights and measures have been standardized on a simple, uniform and comparable basis, though of course the problem is more complex.

Moreover, said the Board, without some more effective means of quality identification, it is impossible for the consumer to compare prices or to tell whether they are moving up or down. To debase quality is unfair competition between business men and it is also unfair to the consumer. "Manufacturers must not be allowed," declared a C.A.B. policy statement of October 5, 1933, "to disguise price increases by asking the same amount for goods whose quality standards have been lowered. Competition for sales in a rising market tends to put a premium on this shoddy practice, and code safeguards should be thrown up against unscrupulous manufacturers who may resort to it." In another statement on November 17, 1933, the Board said: "Without quality standards applying to commodities at every stage of their fabrication and sale, price is today, in view of the complexity of modern fabrication, a highly unreliable guide both for intermediate producers and for wholesalers and retailers, and particularly for consumers." To establish fair competition in the quality field seemed to the C.A.B. an advantage to all parties at interest.

Its argument was based not only on the concept of a proper plane of competition. The main purpose of the N.I.R.A. was to increase and spread purchasing power. "In view of the low level of income to which the depression has reduced American families, and the pressure of rising prices upon these incomes," reported the Board's Committee on Standards, December 1, 1933, "it is imperative that the wastes inherent in unscientific consumer buying should as far as possible be eliminated."⁵⁶ Through quality identification, the public's purchasing power would be protected against the waste of spend-

⁵⁶ C.A.B., *Proposal to Develop Standards for Consumer Goods*, Dec. 1, 1933, p. 2.

ing money "on sub-standard products which lay fictitious claims to excellence." Business men and public agencies bought for the most part by standard specifications, and consumers should have the same advantage. The Standards Committee also held that such development might be expected to reduce manufacturing and retailing costs by minimizing such practices as the wasteful return of goods and sample sales, and thus lead to more orderly marketing and more stability in industry.

In urging quality labelling, the Board took the position that the help given the consumer should be as complete as the nature of the product allowed. Information such as the percentage of wool in a blanket is of some value, but wherever possible the labels should include a quality grade or rating of the product which would assure the consumer that the product had a combination of qualities of an agreed standard. Such quality grading would classify products as A, B, C, or Fancy, Choice, or Standard, or by other agreed designation which must be simple but also significant for the consumer in deciding on the use that could best be made of the product. "Then," said Dr. Lynd, Chairman of the Board's Standards Committee, "freed from confused, depressing fumbling with quality uncertainties, the energies of men and women will be able to concentrate on what they really want in style, color, and so on."

But, in this promotional effort, the C.A.B. was hampered by technical factors, as well as by an almost industry-wide opposition. As pointed out above, though a considerable amount of work had been done by both public and private agencies in developing standards suitable for the trade, very few standards had been worked out for over-the-counter use. Most work in this field related to food products, particularly butter, canned goods, and meats, and had been carried on by the Bureau of Agricultural Economics. The area of consumer standards for industrial products was almost unexplored. The Board's Committee on Standards in recommending the establishment of a Consumer Standards Board declared that the task of developing adequate consumer standards was so great and the need so

pressing that only an agency with federal funds behind it could possibly cope with it. "Outside the government," reported the Committee, "there is no agency which can furnish adequate funds to meet the accumulated need for standards faced by 30,000,000 families." The Committee emphasized the appropriateness of government aid to consumers in view of its past and present extensive assistance to business: "If our national economy is to be sufficiently directed at both ends—in its making and in its spending—the consumer will have to be helped in some wholesale fashion comparable to the \$50,000,000 of annual help which the budget of the Department of Commerce and its Bureau of Standards gives to industry's earning of our annual income."

The type of work to be done was indicated by the functions proposed for the Consumer Standards Board. It would co-ordinate and make available in a form suitable for consumer use the existing work of public and private standardizing agencies; determine the commodities for which standards should first be developed; designate, after consultation with consumers and industry, the qualities to be considered in testing a given commodity; arrange with appropriate federal or other laboratories for needed tests; draw up and promulgate standards; and cooperate with suitable bodies in securing acceptance of standards by industry and by consumers. This would provide for the first time in our governmental administration "a central planning, coordinating and standards promulgating agency in the field of consumer standards." It was proposed that in the first year, in addition to a budget of \$65,000 for the Consumer Standards Board, an additional \$250,000 should be made available for research and testing requested by the C.A.B. at the Bureau of Standards and in the laboratories of the Department of Agriculture.

Failing to get sufficient support for the establishment of the proposed Consumer Standards Board, the C.A.B. had set up a small Standards Unit as part of its staff, as described above. The Unit did a considerable amount of work on basic standards

that should be set up for determining quality rating of a few selected commodities, but its resources were too meager for any significant development in this field. To get the basic standards for a wide range of commodities worked out, the C.A.B. urged that code committees should be set up under each code to develop quality standards for their product. Dr. Brady, of the Standards Unit, after consultation with government and private standards agencies, drafted a provision which the Board recommended for inclusion in all codes. This provided that within 30 days after a code was put into effect, the code authority should set up a committee, one or more members of which were to be appointed by the chairman of the code authority and two other members by the Administrator, one of the latter with the approval of the C.A.B. The committee was to study and recommend standards of size and quality and the labelling of the product of the industry whenever such standards were deemed feasible, and to report to the code authority within six months. After review by the Administrator, the standards adopted should be made mandatory upon the industry, provided that manufacture and sale of non-standard goods should not be prohibited so long as they were accurately labelled as departing from the standards set in given particulars. These standards were also to be submitted for promulgation, through the procedure of the American Standards Association or of the National Bureau of Standards, as "American standards." But, despite the promotional work done by the Board among business and government representatives, provisions for developing standards of quality were almost entirely ignored in code formulation. There was no willingness on the part of industry to try to work out the technical problems involved.

A few codes required certain useful quality information, but standards provisions included in a few other codes were, in the opinion of the C.A.B., contrary to the consumer interest. As Dr. Keezer said:⁵⁷ "I personally have discovered that 'quality standards' which I once thought were inherently

⁵⁷ Address at Cornell, April, 1934, p. 10.

righteous, are very tricky things with which to work. It is quite possible to promote private monopoly through provisions for certain types of quality standards and they bear watching accordingly." It had been found, for example, that in some industries special interest groups had incorporated standards provisions in their code as a means of production control and price-fixing, or of eliminating certain groups of competitors.

In January, 1934, the C.A.B. issued a special policy guide on quality-labelling for the use of its code advisors "to eliminate confusion and to guard against the misuse of provisions for standards in codes." The guide stated that it is not in the consumer interest that low quality goods should be taken off the market, provided that low quality sells for correspondingly low price, serves a use commensurate with the price, does not impede acquisition of better quality at an equally low price or affect costs of distribution in such a way that the consumer has to pay unnecessarily high prices for better quality. What the consumer wants is to know what he is buying, to pay prices which correspond with quality, and to have a basis for comparing different prices and different qualities. The Board declared, therefore, that it is not in the consumer interest that minimum or absolute standards should be set which eliminate low-grade, low-cost products when the low grade is appropriate to some consumer use; or which restrict improvements in technique or the offering of better quality at the same price; or which eliminate variety, except as called for by reasonable efficiency; or which give a monopoly position to certain producers or groups of producers. Consumer advisers were directed to oppose clauses calling merely for the adoption of minimum standards, except in certain cases involving hazard, fraud and so on, and especially to oppose them when they were being used by strong interests to eliminate other producers.

In a statement presented on behalf of the Board at the N.R.A. Code Authority Conference in March, 1934, Dr. Brady urged that standards provisions should be adopted only after approval by the appropriate government agencies in

consultation with consumers as well as manufacturers and distributors, and that every code authority administering standards provisions should have both consumer and government representation on it.

THE CANNING CODE

The difficulties encountered by the C.A.B. in its attempt to promote the development of standards of quality and the use of quality labels on consumer goods is well illustrated by the controversy over the canning code. This was one of the codes transferred from the A.A.A. to N.R.A. early in 1934 but the A.A.A. continued to take a great interest in it. The issue in this case was clear. The Department of Agriculture had worked for some time on standards of quality for canned goods and had actually prepared a series of grades for a number of them. Moreover, under the McNary-Mapes amendment to the Food and Drug Act, minimum standards below which certain goods could not be sold without being labeled sub-standard, had already been promulgated. There were no serious technical difficulties involved. In the opinion of the C.A.B. and of the Consumers Counsel, A.A.A., sufficient work had already been done to permit the establishment without delay of three grades for canned goods above the McNary-Mapes sub-standard level. The consumer adviser on the canning code therefore tried to have a provision for grade labelling included in the code.

Preliminary hearings on the canning code, held under the A.A.A., had already indicated that the canners, organized through the National Canners Association, would strongly oppose grade labelling. This opposition was still more evident in December, 1933 at the Congressional hearings on amending the Food and Drug bill, the first draft of which made provision for setting up standards of quality for consumer goods. Nevertheless, at the public hearings on the code under N.R.A. on February 8 and 9, 1934, Mr. Karl Hauck, consumer adviser for the C.A.B., suggested the adoption of the grades already established by the Department of Agriculture, and the setting

up of an industry committee to work out standards for products for which grades had not been developed.

This was one of the few occasions on which the Board was able to rally behind it very strong unofficial as well as official consumer support. At the hearings there were 21 representatives of different government departments, labor, consumer and women's organizations to be heard in support of the Board's proposal. This was considered a test case by the C.A.B., and to indicate its importance, Mrs. Rumsey herself appeared to support the consumer adviser.

Evidence was presented at the hearings to the effect that some canners were already financing their packs on the basis of the Department of Agriculture grades. Moreover, American shippers into Canada complied with the Canadian requirement that canned goods be labelled by grade. "To protect the consumers, and enable them to utilize wisely their purchasing power," said Mr. Hauck, "we request that the canning industry make it possible for the ultimate consumer to know what she is receiving and what she is paying for, by adding quality gradings on the cans and labels . . . The feasibility of this method of informing the buying public is illustrated in the experience of the Dominion of Canada." Miss Alice Edwards, representing the American Home Economics Association, which had done promotional work in the quality field, declared: "That price cannot be relied on as a guide to quality (in canned goods) is supported by numerous investigations by individual consumers in various parts of the country, by findings of the Federal Trade Commission, and by judging contests carried on by the canners themselves." One witness followed another, representing large numbers of people in different organizations, with the same reasoned request for quality grades on products canned for their use.⁵⁸

It was a unique opportunity for cooperation between the canning industry and their customers, and there were members

⁵⁸ See C.A.B. Statement: Testimony on Standards for Consumer Goods at Canning Industry Hearing, Feb. 8 and 9, 1934.

of the industry willing to take advantage of it. But they were not the controlling members. On the opposition side there was the National Cannery Association. There were the wholesale grocers who used their own labels. There were advertising agencies and publishers, fearful that labelling might destroy the value of advertised brand names. It was an embattled array, under the leadership of Mr. Paul S. Willis, President of the American Grocery Manufacturers Association. They offered little active opposition at the hearings, but when the final code draft was sent up to the President for approval, there was no provision in it for quality grades. The President, however, by Executive Order, made his approval of the code conditional on the establishment by the industry of a committee to formulate standards of quality and make recommendations within 90 days for inclusion in the code of whatever provisions should be found acceptable.

The canning industry thereupon set up a labelling committee. At the same time a committee of three government representatives was appointed to advise the Administration, this committee consisting of C. W. Kitchen, Assistant Chief of the Bureau of Agricultural Economics; W. B. White, Chief of the Food Control Laboratories, Food and Drug Administration; and Karl Hauck of the C.A.B. staff.

An interim report was made by the industry committee within the 90 days set, and a final report on September 29, 1934. These reports "served to crystallize an essential point of disagreement between the canners and the government advisers on the way in which labels should be made to describe contents." The industry now admitted that the housewife was entitled to more information about quality, and recommended a method of "descriptive labelling," while rejecting any form of "grade labelling." The government advisers strongly criticized the proposal for descriptive labelling as a solution of the problem, since it failed to meet the needs of consumers. To adopt the plan for descriptive terms alone would result in placing such multiplicity of material on the label that it would

merely lead to confusion. Moreover, it would still leave the consumer guessing on some of the most important points he wanted to know—*e.g.*, the degree of maturity of the canned product. The government advisers disagreed with the industry committee that quality grades were impractical and pointed out that the Department of Agriculture had worked out plans looking to the complete standardization of canned products in such a manner as to leave no doubt as to their enforceability; it had already prepared a draft of quality standards for canned tomatoes sufficiently definite and objective to be enforceable in an action under a criminal statute. They recommended the inclusion on canned food labels of a concise, truthful statement of grade and such additional explanatory statements as style of pack, count and size of units, number of servings and so on.

The C.A.B. supported the position taken by the government advisory committee. Perhaps of more significance was the fact that Mr. Armin W. Riley, Division Administrator in charge of the Canning Code, threw in his weight on the side of grades. In an article in *Advertising and Selling*, October 11, 1934, he wrote: "So long as the canners permit such concealed quality to be a football for cut-throat trade practices, they can achieve no firm basis of competition . . . I personally am entirely convinced that grade labelling is both feasible and advantageous to the canning industry, and I say this out of long merchandising experience . . . It would be specious to suppose that the government has any intention of offering its technical aid [in working out standards] for any purpose other than furthering stable marketing conditions and giving the consumer a chance to know what he is buying. It is a misconception to suppose that the Government intends to dictate standards to any industry. Under the N.R.A., industries are invited to set up their own committees to study standardizing problems and to agree on promulgating them when feasible." In reply to criticism that once fixed, standards of quality are not easily changed to take advantage of new discoveries, Mr. Riley said:

"My understanding is that all industries using the Bureau of Standards for establishing commercial standards, have standing committees which meet whenever it seems necessary to revise existing standards." He drew attention to many inconsistencies in the trade arguments—some canners said, for example, that adoption of grades would cause packers to pack to the minimum of the grade and thus lower quality, while others claimed it was impossible for canners to pack to grade at all.

Mr. Riley recognized, however, that there were certain misconceptions and genuine fears among members of the trade. Some feared, for example, that it was not practical to measure quality so objectively that it would stand a court test on charges that a product did not meet the grade marked on it by the packer, and that there would consequently be expensive litigation. Some feared that the use of the grade label would destroy much of the goodwill value of a brand name in which considerable equities had been built up. It was also argued that consumers would hesitate to buy lower grades and canners would be unable to dispose of them.

To answer some of these questions, Mr. Riley encouraged the C.A.B. to carry through its proposal to send representatives to Canada to make a survey of the compulsory system of grade labelling that had been in operation there a number of years. Two representatives, one from the C.A.B. and one from the Department of Agriculture, went to Canada and presented their report to the Division Administrator on December 21, 1934.

In Canada, they reported, grading was enforced in the case of all meats and canned fruits and vegetables destined for inter-provincial trade. The report stated that canner and trade opinion was behind the grading regulations in Canada, making the task of enforcement a routine matter for the authorities. Legal action had been largely avoided in labelling disputes by use of the important but simple device of a "Held" tag, which placed goods under temporary detention by an inspector until the grade was checked at Ottawa. If the canner's grading was

proved right, the lot held was released for immediate shipment; otherwise, the canner had to relabel it. In only one instance had a grade question got into the courts, and then the use of the "Held" tag was approved. The grading law had been rigidly enforced for the past eight years, and though the C.A.B. investigators heard arguments against certain features of it, no one had suggested the scrapping of any of its significant provisions. In reply to certain arguments from the American trade, the investigators reported that the evidence showed the Canadian grades were clearly defined for practical marketing purposes. There was a small price spread for different products of the one grade, due either to advertising, superior pack or so on. An advertised brand name still had a considerable goodwill value. At the same time, there was a definite price spread between the quality grades of any one product, showing that the use of the grade label prevented prices from straying very far away from the quality range where they belonged. The cost of inspection through regular visits to canneries and surprise visits to warehouses and stores was so low that the sanitary results alone would justify it. Further, the General Manager of Canadian Canners, Ltd., which packed half the canned goods sold in Canada, told the investigators that his firm spent less than \$500 a year on samples—a costly practice in U. S. A. It was also said that the use of grades had greatly facilitated the making of loans to canners. The investigators quoted as typical the opinion expressed by the President of the Associated Quality Canners, Ltd.: "I cannot imagine conducting a canning business without Government grades to assure fair competition. Perhaps an unscrupulous bird gets away with mis-labelling a carload once in a great while; but he will be caught at it sooner or later, and I think it is safe to say that 99 per cent of our packs are honestly and correctly labelled by grades. If Government grading means ruin to an industry, why aren't we all ruined in Canada?"

On December 22, 1934, the Advisory Council of N.R.A., at the instance of the C.A.B. submitted a recommendation to

the National Industrial Recovery Board on the issue of quality labelling.⁵⁹ They pointed out that within recent weeks the N.R.A. had been sponsoring the principles of open-pricing and of publicity in pricing matters. To give publicity full effect it was necessary that the products to which the prices referred should be as fully understood as possible. However, in the opinion of the Council, many of those who had been the strongest proponents of more information on quality frequently had too little regard for the technical difficulties involved in developing standards of quality and expressing them in a way that would be truly helpful for consumers. The Council believed that industry would benefit from informative labelling and accurate grading of commodities since it would lead to more efficient industrial practice and would encourage confidence in the quality of goods. They recommended that machinery be set up under the specific codes to forward the development of such informative labelling of producers and consumers goods as would *a.* give prospective purchasers and competitors as accurate a description as is practicable of the significant qualities and other factors with respect to given commodities; *b.* provide prospective purchasers with such information as is necessary to make possible comparisons between alternative offerings of a commodity; *c.* not limit ingenuity in providing new products; *d.* not curtail the offering on the market of any product, unless it is believed to be harmful to its user. They recommended also that standards should not be approved in codes unless they had first been submitted to some technically competent Government agency for report.

The Council was divided on the question whether, under any circumstances, standards might be imposed on an industry without the consent of a substantial majority of the industry concerned. The existing procedure was to require such consent, but the majority of the Council did not feel that the N.R.A. should under all circumstances be bound by that procedure. The Industrial Advisory Board opposed this view so strongly

59 A. C. Decision No. 142, 1934, p. 166.

they submitted a formal minority report to that effect. They argued that it was proper to include grades and standards in the codes with the assent of the industry, but otherwise, they should only be imposed by general legislation on the grounds of the protection of health or essential public interest, and in those circumstances should be administered and enforced not through the code process but through existing administrative branches of the Government already established for that purpose.

The quality issue, in so far as it related to the canning industry, was now well joined. It was the subject of debate throughout the country. American canners discussed the relative merits of descriptive labels and grades at their conventions. County Consumers Councils distributed bulletins on quality labelling prepared by the Consumers Division, N.E.C. There were recruits from industry to the grading cause. The A.&P. Co. notified Division Administrator Riley that henceforth it would label goods marketed under the A.&P. brand with the grade designations adopted by the Department of Agriculture. The Executive Committee of the Food and Grocery Chain Stores of America, Inc., agreed to recommend grading to its members.

But meanwhile the canning code was in operation without any provisions for quality labelling. And the uncertainty about the future of the National Industrial Recovery Act made the N.R.A. generally unwilling to force any issue in the early months of 1935. Nothing further was done before the Schechter decision of the Supreme Court was announced.

THE CODE AUTHORITY

No mention was made in the National Industrial Recovery Act of the code authorities which were set up to administer the codes of fair competition, though obviously the constitution and function of these bodies was of the greatest public importance. It was uncertain for some months just what form the code authorities would take, and what powers they would exercise,

and as a result there was considerable variety in the early code provisions relating to them. But in all instances their powers were considerable not only in the administration of the codes as such, but in interpreting code provisions, and in initiating action of different kinds, including code amendments. The code authorities determined for the most part which violations should be condoned, which compromised, which referred to the government for prosecution. The authorities were also empowered in many instances to establish subsidiary committees, trade practice and regional committees, which in some industries became the actual administrative bodies under the codes. In addition to the powers actually vested in these authorities, there were opportunities for abuse of power, of which they at times took advantage, particularly in relation to pricing policies. The authorities financed their activities by levies on members of the industry.

Despite considerable difference in the form of code authorities, and the degree to which they represented independent elements in an industry and so on, they were all from the outset and continued to be industry-governed bodies, predominantly under the control of the trade association members when there was a trade association in the industry. There was to be "self-government" in industry, though frequently this meant government by the dominant groups.

The public character of these authorities, which were, in fact, administering public law, was vaguely acknowledged in most codes by provision for the appointment of one or more government representatives, sometimes with, sometimes without, voting power. In some of the early codes, as in the much-discussed iron and steel code, and in the codes for the electrical industry, the automobile manufacturing industry, and others, there was at the beginning no provision at all for a public appointee.

The C.A.B. took the position that the administration of the codes was as important as their formulation. The code authorities were public bodies existing only by virtue of the National

Industrial Recovery Act. Industrial decisions were now to be made under authority of the codes, instead of through bargaining in the market place, and it was important that all parties at interest should be represented in their administration. In her statement at the Senate Finance Committee hearings on N.R.A., April, 1935, Mrs. Blair urged that the composition and powers of the authorities should be definitely determined by law, and argued that "their composition should be appropriate to their public character."⁶⁰

The policy of the C.A.B. was to press for both government representation on the code authorities, as public bodies, and for separate representation of both consumer and labor interests. They argued that government representation should increase proportionately with the powers of industrial control provided for under the industry code. In its memorandum on revision of the National Industrial Recovery Act, January, 1935,⁶¹ the Board took the position that "a single administration member might suffice on a code authority which deals only with labor, quality and fair practice minima. Any agency on the other hand, which administers the output, price and profit controls which must be present in the government of the natural resource industries must be predominantly public. Between these extremes, public control must balance grants of power. Public representation on the authorities administering the codes of those industries where high concentration assures market dominance should at least equal that of industry itself." In developing this point of view, Mrs. Blair suggested that the code authorities might be organized in different ways and she drew attention to the administration of the petroleum code, which was in the hands of public appointees with an advisory industry board.

The C.A.B. also argued that there should be government representation not only on the central code authority but also

⁶⁰ *Op. cit.*, p. 973.

⁶¹ Appendix I.

on subsidiary and regional authorities, since the actual administrative decisions were frequently made at these points.

In the policy guides, the C.A.B. referred to a frequent contention that public representatives should serve without cost to the industry. But in practice this might very well limit the effectiveness of public supervision, and the Board therefore took the position that adequate finances for public representation should be included among the costs of operating the code authority, and that the exercise of the powers of the authority should be made contingent upon the provision of these funds.

The C.A.B. was not satisfied, however, that even effective public supervision of the code authorities would secure the representation of the consumer point of view in the administration of the codes. They argued for separate representation of the consumer interest as the Labor Advisory Board argued for separate representation of the labor interest. The C.A.B. position was explained at some length in its brief on the oil price schedule prepared for the December, 1933, petroleum hearings.

The shift from the market to a board as the agency of industrial control was, argued the brief, of vital importance to all parties to the industry. The proposed control was to be exercised under a system rather vaguely characterized as the "self-regulation of industry," but in this sense "industry" should properly be broadly interpreted to include not only the business men who direct individual enterprises but all the parties who have a stake in industry and who usually are understood to make the market. "In considering consumer representation," the brief continued, "it is not sufficient to assure that government administration supervising an industry, and acting in a semi-judicial and semi-executive capacity, can also perform the function of consumers' representative in a bargaining process. In establishing price and determining quality, an administrator is placed in a false position if he is expected to act as a mediator between the parties at interest in an industry . . . and at the same time to act as advocate

of one of the parties at interest, whether consumers, workers, investors, or managers. Experience indicates that in the effort to bring agreement between industrialists and laborers, an administrator is all too likely to overlook the interest of the consumer. Only as consumer representation is made direct and independent of the executive-judicial function can the balance of interest be maintained and the mediator perform his office in the interests of all groups."

But in developing this point of view the C.A.B. crossed swords with General Hugh Johnson, N.R.A. Administrator, whose position seems to have been that the Administration itself represented the public interest, and the public interest was identical with the consumer interest. He seems never to have recognized the fact that the public interest as expressed administratively is a compromise of pressures exerted on the government, and that in the absence of direct consumer representation the consumer interest is not likely to be reflected in the final determination of policy, or in the administration of the codes.⁶² On November 3, 1933, members of the C.A.B. formally expressed their opposition "to any official inference that the deputy administrator should constitute proper and sufficient representation of the consumer on such authorities." The consumer interest had been officially recognized in the formulation of the codes and should also be recognized in their administration.

Industry was strongly opposed to consumer representation on the code authorities, and even to labor representation, though in some of the garment trades labor representatives were appointed. And after the first few months of the N.R.A. experiment, the attitude of the Administration, which had at first been uncertain, became definitely opposed to the idea of such representation. At this time, N.R.A. officials were working on a model code for the guidance of industries and in the early drafts provision was made for the appointment of three administration representatives on code authorities, one of

⁶² See *e. g.* N.R.A. Release, June 25, 1933.

whom should represent the government, one labor, and one the consumer interest. But opposition developed to this proposal and it was finally deleted. On November 3, 1933, Dr. Corwin Edwards reported to Board members that his efforts to have the provision reinstated met with the argument that public representatives were consumer representatives, that in any case the consumer had no interest in capital goods codes, and so on.

During November, 1933, the C.A.B. gave considerable attention to this problem, and consumer advisers were directed to oppose codes in which no provision was made for consumer representation on the authorities. Advisers asked to be relieved of the responsibility for opposing codes on this ground, however, because of the determined attitude of the Administration. In presenting this request to Board members on November 17, the Executive Director urged that ways be found for getting the model code amended to include provision for direct consumer representation. The C.A.B. and the L.A.B. were in substantial agreement on this issue.

As was pointed out above, early in 1934 General Johnson agreed, not to the direct consumer and labor representation on the authorities that had been asked for, but to the appointment of consumer and labor advisers to the Administration members of the authorities. But this advisory service was not satisfactorily worked out, except in a few instances.

The C.A.B. continued to urge direct representation of the consumer interest on the code authorities throughout the life of the N.R.A., though they were of opinion there should be no rigidity about the formula for representation that was adopted. They took the position that if the authorities could be properly constituted to represent the different interests affected, they might play a very significant role in the national economy. "In the Code Authority," Dr. Keezer suggested⁶³ "there is possibly the germ of an institution which might save the United States an enormous amount of economic woe." In the opinion of the C.A.B. the Code authorities presented the pos-

⁶³ Address at Cornell, April 19, 1934.

sibility of a new form of industrial regulation in which the special interests of particular groups, and the interests of the general public were not set against each other as in utility commission hearings and anti-trust suits, but were fused in the process of decision-making. Imperfect and one-sided as code authority organization was at the time, no agency in American government or business seemed to the Board to offer a greater possibility for promoting industrial initiative under public control.

A PROGRAM FOR INDUSTRY REGULATION

As a result of its analysis of specific code provisions and its observation of the code process, the C.A.B. gradually hammered out a statement on consumer policy for a general and basic program of industrial regulation and control. The Board's suggestions for revision of the National Industrial Recovery Act submitted to the N.I.R.B. on January 5, 1935, were released by the N.I.R.B., without comment, on January 7.⁶⁴ The position taken in this statement was defended by officers of the Board at the Senate Finance Committee hearings on the N.R.A. in March-April, 1935.

In their evidence before the Senate Finance Committee both Mrs. Blair,⁶⁵ Chairman of the Board, and Dr. Blaisdell,⁶⁶ formerly Executive Director, declared that though the Board had been one of the most articulate and sternest critics of certain policies of the N. R. Administration as embodied in the codes, nevertheless, it was sympathetic with the purposes of the National Industrial Recovery Act itself and approved the effort to effectuate those purposes through codes of fair competition. In fact the Board had no authority to support any policy other than that embodied in the Act. The Board's criticism of N.R.A. policy and practice was criticism of the administration of the Act, not of its purposes as set out in

⁶⁴ See Appendix I.

⁶⁵ *Op. cit.*, pp. 964-974.

⁶⁶ *Ibid.*, pp. 591-602, 632-681, 824-849.

the preamble: ". . . to promote the fullest possible utilization of the present productive capacity of industries, to avoid undue restriction of production . . . to increase the consumption of industrial and agricultural products . . . and to conserve natural resources. . . ."

In its memorandum on revision of the National Industrial Recovery Act, the Board declared: "If the Recovery Act, in its practical application, has unduly restricted production, prevented the fullest possible utilization of productive capacity or failed to increase consumption, it is because the pressure of special interests for individual advantage has diverted the course of the Act from that which Congress intended it to follow."⁶⁷

The Board advised against the abandonment of the N.R.A. experiment. Dr. Blaisdell declared that the immediate effect of such a course would be disastrous to Labor, for the N.R.A. had protected Labor from carrying much of the competitive risk that properly belonged to Business. Further, to abandon the N.R.A. would be to leave unregulated a large area of industry in which central control of price and production policies already existed in some degree independent of N.R.A. But industrial regulation through a system of code control should deal adequately with the realities of the industrial situation as revealed by N.R.A. experience.

This experience indicated that industry could be divided into four main groups. It was clear there were large areas of industry in which effective competition still existed; this constituted the first group. Then there were other areas in which it was impossible to establish codes of fair competition because private agreements had already eliminated competition to a greater or less extent, despite the anti-trust acts. Thirdly, there were the natural resource industries, as lumber, coal, oil, which differ from other groups in that they alone present the problem of conservation. There was a fourth group in which monopoly had

been publicly recognized and placed under public utility regulation; this group was therefore outside the scope of the present discussion.

Within these broad groups the Board recognized that "no common formula can be applied to the control of several hundred industries and trades which differ one from another in their essential characteristics." Any program of control must be flexible to be realistic. Nevertheless, general lines of policy could be drawn for the three broad groups of industries, excluding the public utilities.

For the first group, covering a vast majority of industries, codes should provide a minimum of regulation—minimum labor standards and provisions prohibiting trade practices that were generally recognized as "unfair," and providing for quality standards. In this group, competition should still be the most important regulating force. The "strait jacket" which some industries, particularly in the distributive trades, had devised to protect established interests, should be abandoned. Under exceptional circumstances it might be shown to be desirable to institute additional controls; business might make out a case for the establishment of standard cost-accounting systems, open-price reporting, prohibition of loss leaders and so on, but the onus of proof would be thrown on the industry, and whenever any provision was made for the control of trade practices, each such extension of privilege should be conditioned upon a proportionate extension of public supervision. Within this broadly competitive group there were still many problems to be tackled, and consumer representatives would have to determine the consumer interest in any particular situation. But the code system offered a possibility of establishing fair competitive practices in this group.

In the second group, in which private controls of various kinds were already established before N.R.A. days, there was need for the development of codes of "fair monopoly" rather than codes of "fair competition," unless Congress were determined, and able, to restore effective competition. N.R.A.

had in many cases implemented these controls through code provisions, or merely by bringing the leaders into closer cooperation with each other. Evidence of the widespread existence of private price control practices had accumulated during the N.R.A. experiment, and the C.A.B. had made a special study of some of them. Dr. Gardiner Means, an economist of the Department of Agriculture and a member of the C.A.B., had prepared a statement on "Administrative Prices," later published as a Senate Document, No. 13, 1935, 74th Congress, 1st Session; and another statement on "Private Price Control and Code Policy" was prepared by Dr. Ruth Ayres and Dr. Enid Baird of the C.A.B. staff for the N.R.A. price hearings, January, 1935.⁶⁸ These statements were quoted from extensively during the 1935 Senate Finance Committee hearings on N.R.A.

The latter statement illustrated ways in which code provisions had helped to make existing controls more effective. In the Cement Industry, for example, a basing point system already well established was implemented though not specifically authorized by provisions in the code. Other cases cited related to the Asphalt, Shingle and Roofing Industry, the Plate Glass Manufacturing Industry, the Paper Distributing Trade, the Textile Bag Manufacturing Industry, the Iron and Steel Industry. The Board contended that the term "code of fair competition" could not properly be applied in these cases. Some of the private controls that had been devised were legal under court interpretations of the anti-trust laws, but others were expressly prohibited or subject to court action if proved. Nevertheless, they existed. To withdraw codes from these industries might weaken the control structure, but would not necessarily destroy it and it was a question whether it would not be better to recognize and regulate the controls privately established, particularly in those cases where it was not considered desirable to go to the extreme of public utility regulation. During the Senate Finance Committee hearings, in a

68 See N.R.A. Hearings, Senate Finance Committee, 1935, p. 875.

discussion of practices in the Cement Industry, Senator Black asked Dr. Blaisdell: "Where they step in and deliberately destroy the competitive system have they a right to complain when we say we are not going to let them gouge the public by these prices?" "That is essentially the position I have been taking," replied Dr. Blaisdell.

In these cases, the Board thought it might be necessary to bolster code control by other aids, as, *e.g.*, the Federal Trade Commission, or the removal of tariff protection, or so on. Public representation on code authorities of industries where high concentration assured market dominance, should at least equal that of industry itself, and provision should be made for regular reports on costs, prices, and profits.

But whereas effective public supervision might be worked out for industries in which high concentration had destroyed market freedom, full social control was necessary in the natural resource industries where the problem of conservation was involved. In their memorandum on the revision of the National Industrial Recovery Act, the C.A.B. argued that the active competition which elsewhere served the consumers' interest, here occasioned flagrant waste. It was unthinkable, therefore, that the natural resource industries should again be subjected to the anti-trust laws. But any authority which administered the output, price, and profit controls of these industries must be predominantly public. To quote:

The very measures by which resources are conserved often place a check on one group of profit seekers and augment the receipts of others. Equity, therefore, demands that any set of output restrictions be accompanied by a tax which will appropriate for public uses the increase in income attributable to the controls which the government has applied. The consumer may fairly be asked to pay more for oil in order to conserve its supply, but he may reasonably object to a policy whereby the government compels him to contribute to the creation of private fortunes. The natural resource industries are too vitally affected with a public interest to be turned over to what is called "self-government in industry."

They must be regulated by public agencies for the common welfare . . .

In short "the socialization of monopoly and the civilization of competition—these are human objectives which cannot long be delayed."

With more particular reference to legislative provisions that might protect the consumer interest under a revised code system, representatives of the C.A.B. laid emphasis on three or four points. Mrs. Blair urged that the Consumers Advisory Board should be given legislative status. There was nothing in the existing act providing for representation of the consumer interest in the N.R.A. The New Deal Administration itself had been responsible for the beginning of a mechanism through which the consumer interest in the organization and direction of industry might be made articulate. But this function should be strengthened by statutory recognition. In the absence of any central government department entrusted with the interests of the consumer, the appointment of members to this consumer agency should be specifically provided for by Congress.

The suggestion was also made that the concept of "unfair competition" should be broadened. Decisions handed down by the courts indicated that competition was not "unfair" unless it injured a competitor; unfair competition should be definitely defined in the act as competition unfair to consumers as well as to competitors.

Further, the act should include among its fundamental purposes the promotion of informative labels and commodity standards and should direct the administration to seek these ends by appropriate code provisions.

The importance of the code authorities should be recognized in the act, and provision should be made for the representation of different interests on the authority, though the extent of their participation might differ according to the nature of the controls established. The C.A.B. was not prepared to recommend a simple common formula for the designation of Labor or Consumer members on each of these bodies. It might be

well for a time to experiment with different methods of representing these interests, both direct and indirect. But they must be represented. Dr. Blaisdell in his testimony at the Senate Finance Committee hearings added that for such representation to be effective, proper financing should be provided for in the act.

One of the most valuable results of the N.R.A. was the accumulated body of information it had made available, though this was still inadequate for any proper consideration of the industrial problem. In any revision of the National Industrial Recovery Act, therefore, detailed provision should be made for the collection, analysis, interpretation and publication of industrial and trade statistics on which business policy and public policy should be based in the years to come.

Speaking generally of the objectives to be aimed at from the consumer point of view in any legislation for industrial regulation, Mrs. Blair said at the Senate Finance Committee hearings: ⁶⁹ "The standard of living for masses of our people is still shamefully low. Yet there are available the machines, the labor, the technical knowledge to produce the goods which we consumed before the depression. Our need is to utilize these rather than to stabilize production at something like present low levels. Moreover, we need to continue in the future the technical progress which has been raising American standards of living for a century. Devices and agreements that arbitrarily close the door on new processes, new ideas, new methods that tend by bringing down unit costs to make goods available at ever lower prices, would inevitably prevent such progress. The incentive under our present system to induce industry to seek these improvements is the need to find customers for their products. In other words, improvement in production is stimulated through open competition, industry by industry, for a market for its goods. The desirable social end, the Board holds, is increased production at lower unit costs and consequent increased consumption at lower unit prices."

⁶⁹ *Op. cit.*, p. 968.

CHAPTER III

CONSUMER REPRESENTATION IN AGRICULTURAL ADJUSTMENT

THE agricultural program, as it has developed under the Roosevelt Administration, has been embodied in a series of acts and amendments the significance of which, as part of a coordinated plan, is not at first easily grasped. The Agricultural Adjustment Act, 1933, which preceded the National Industrial Recovery Act on to the statute book, was amended on different occasions, the most important amendments being adopted in August 1935, after the National Industrial Recovery Act had been declared invalid. The production control features of the Agricultural Adjustment Act were in turn declared invalid by the *Hoosac Mills* decision of the Supreme Court, January, 1936, and in the following month, the Soil Conservation and Domestic Allotment Act was speedily passed to protect certain features of the invalidated program. A section of the original Agricultural Adjustment Act, which empowered the Secretary of Agriculture to enter into marketing agreements, was not held unconstitutional by the Supreme Court, but there arose a conflict of opinion in a number of federal district courts as to the separateness of the marketing provisions from the production control provisions. To clarify the situation, the Agricultural Marketing Agreement Act was passed June 1937, embodying for the most part the marketing program as written out in the August 1935 amendments. A new basic Agricultural Adjustment Act, embodying new and old features, was passed early in 1938. This again provided for the control of agricultural production and also empowered the Secretary under certain conditions to establish an "ever-normal granary" for a number of basic commodities.

Amendments in the farm program over this period reflect a variety of changed conditions in agriculture: changes from favorable weather to drought and back to favorable weather;

growing depression abroad, aggravating the export market situation; fluctuating domestic demand. But throughout, the central aim has been to restore agriculture to a "parity price" basis by the cooperative control of agricultural production.

PARITY PRICE

The main objective of the National Industrial Recovery Act, as pointed out above, was to get men back to work in industry. But the farmers were at work, harder at work than ever. What they wanted was to get a decent return for their labor. During the depression, agricultural price levels on the average had fallen farther and faster than industrial prices and a revolt of the farmers was more imminent than a revolt of the unemployed. As large supplies of farm products piled up before a declining market at home and abroad, tremendous pressure was exerted by agrarian groups in different parts of the country for political action to relieve the farm situation.

The Agricultural Adjustment Act authorized the Secretary of Agriculture to take certain action to increase farm prices. But a legal limit was set to the objective of increased prices. This limit was the "parity price level," that is, the level that would give agricultural commodities "a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period." The base period for most commodities was set at 1909-1914, the only period in the previous 25 years that might be called "normal"; it also was a period in which the relation between agricultural prices and prices of goods bought by farmers was favorable to agriculture. The argument of agrarian leaders in insisting on this favorable period was that the subsequent development of a high tariff policy had done a great injustice to farmers, particularly those who produced a commodity with a surplus for export.

The underlying theory of the parity price program as expressed on different occasions by Secretary Wallace and other farm leaders was the necessity of maintaining a proper balance

between the major economic groups of agriculture, labor and industry. "We are committed," wrote the Secretary in his book, *New Frontiers*,¹ "to getting the farmer, the laborer and the industrialist such share of the national income as will put each in a balanced relationship with the other." When this balance was achieved, there would be additional purchasing power in the hands of farmers, their demand for industrial products would then increase, and this would help to bring about a general recovery. It was this belief that won considerable support from non-farm groups for the agricultural program.

The parity formula as written out in the original Agricultural Adjustment Act was opposed on different occasions by different farm groups as being too limiting, and they were able to obtain some modifications of it. In the amending act of August 1935, it was provided that in measuring pre-war purchasing power, account should be taken not only of commodities farmers buy but also interest and tax payments. In 1938 increases in freight rates were added to this. In the marketing act of June 1937, following a period of high feed prices resulting from the droughts of 1934 and 1936, representatives of milk producers and distributors succeeded in getting the milk industry practically exempted from the parity restrictions, so that milk prices might be lifted higher than the formula allowed.

But farm leaders soon came to realize that high prices per unit of product do not always yield higher gross income under a system of reduced production, nor higher net income because costs do not always fall proportionately with reduced quantities. It is volume multiplied by price that counts. In the Soil Conservation and Domestic Allotment Act, therefore, the parity objective was changed to express the idea of income rather than price. The objective now was to re-establish the 1909-14 relationship between the per capita net income of individuals on farms and the per capita net income of individuals not on

¹ Henry A. Wallace, *New Frontiers*, 1934, p. 29.

farms. But when the new Agricultural Adjustment Act was passed early in 1938, whether from confusion or misunderstanding, the objective was stated both in terms of price and in terms of income, which must be somewhat embarrassing to the administrators, or would be were it not that prices of most major commodities are still considerably below parity, however interpreted.

Farm prices under the agricultural program are to be raised to the parity level, but the rate of progress toward that level is itself subject to statutory limitation. Under the original act, considerable opportunity was given for the exercise of administrative discretion, and it was within the limits of this opportunity that argument in the consumer interest could be advanced. The Secretary was "to approach such equality of purchasing power by gradual correction of the present inequalities therein at as rapid a rate as is deemed feasible in view of the current consumptive demand in domestic and foreign markets." For years, statisticians of the Department of Agriculture had worked on statistical tables and charts showing changes in consumption for different products at different price levels. The price to be aimed at, at any given time, whether the statutory parity or lower, should be that at which a sufficient quantity of a product could be moved into consumption. In determining what was a sufficient quantity, however, there was room for difference of opinion, for a small quantity at a high price might be as remunerative to the farmer as a larger quantity at a lower price, though obviously from the consumer point of view the second alternative was the desirable one. In the August 1935 amendments the rate of approach to parity was limited not only in terms of the "current consumptive demand" but also "in the general public interest."

Another limitation in the original Agricultural Adjustment Act on the power vested in the Secretary of Agriculture to raise farm prices, was a provision to the effect that the farmer's price should not represent a greater share of the consumer's dollar than it did in the 1909-14 period. In the process of in-

terpretation, this seemed to imply that the distributors' margin was to be protected, though apparently this was not the original intention. This provision, which met with some criticism from the courts as being a vague and unintelligible standard, was dropped in the 1935 amendments.

In fixing a parity limit to the program for increasing farm prices, no provision was at first made to limit the control program in terms of the actual quantity of farm products to be made available for consumption. In 1933 huge surpluses of farm products were in storage and there was no immediate threat of a short supply. But after the drought of 1934 the situation changed, and during 1935, pressure developed from within the Administration, and particularly from the Consumers Counsel Office² for some statutory guarantee that under the production control program a sufficient supply of commodities would be available to meet "normal" consumer demand. In line with this thinking, Senator Wagner introduced an amendment into the Soil Conservation and Domestic Allotment bill, 1936, providing for quantity criteria in the control program. This amendment was at first defeated in the Senate but later accepted after it passed the House following some press publicity on the "ploughing under of consumers." A similar provision was included in the Agricultural Adjustment Act, 1938, now the basic act. This provides (section 304) that "the powers conferred under this act shall not be used to discourage the production of supplies of foods and fibers sufficient to maintain normal domestic human consumption as determined by the Secretary from the records of domestic human consumption in the years 1920-29, inclusive, taking into consideration increased population, quantities of any commodity that were forced into domestic consumption by decline in exports during such period, current trends in domestic consumption and exports of particular commodities and the quantities of substitutes available for domestic consumption within any general class of food commodities." In carrying out the purposes of the

² See below, pp. 245-6.

1938 act, the Secretary was directed, generally, to give "due regard to the maintenance of a continuous and stable supply of agricultural commodities for domestic production adequate to meet consumer demand at prices fair to both producers and consumers."

The principle of guaranteed minimum quantity is supported by elaborate provisions in the 1938 act empowering the Secretary to establish marketing quotas for basic products and an "ever-normal granary." Its embodiment in legislation is a statutory recognition of the consumer interest in a price-raising program for agriculture through a system of production control.

PRODUCTION CONTROL

Under the 1933 agricultural program, farm prices of a group of "basic" commodities were to be raised through a system of controlled production. This was a voluntary system, with strong financial inducements to cooperating farmers. At first, the general objective was reduced production. As a result of the falling off in overseas exports, it was estimated that about 40 million acres would have to be taken out of production.³ The domestic market was also weak. Stocks were large. But after the 1934 drought, it became clear that a long-time policy might have on occasion to provide for increased production. The amending act of 1935 therefore substituted the idea of adjustment for that of reduction.

Cooperating farmers were to receive benefit payments from funds raised by a tax on the first processing of the particular product affected. It was assumed that most of this tax would be passed on to consumers. But there was surprisingly little Congressional opposition to this aspect of the program, partly because of a widespread feeling that the farmer had not had a fair deal in the past, partly because of a belief that farm recovery would help general recovery, largely no doubt because

³ See *e. g.*, Address by H. R. Tolley, at Ohio State University, January 31, 1934.

this was the beginning of the New Deal and bad times called for experimentation.

There was, however, great concern among the framers of the act lest the middlemen, the processors and distributors, should take advantage of the parity price policy to pyramid prices and profits for themselves and so bring down increased consumer opposition on the whole agricultural program. A provision was therefore included in the original act to the effect that when any processing tax took effect, the Secretary, in order to prevent profiteering, was to make public such information as he deemed necessary regarding, for instance, the relationship between the processing tax and the price paid to farmers, the effect of the processing tax upon prices to consumers of products of the commodity, the relationship in previous periods between the prices paid to farmers and prices to consumers.

When the Hoosac Mills decision invalidated the original Agricultural Adjustment Act, in January 1936, because of its production control and processing tax features, it was replaced by a soil conservation program with the same basic objective, but dependent to a greater extent on cooperation with the States, and with benefits to farmers paid directly from the federal Treasury. This decentralized system did not work out satisfactorily, and in view of a more favorable trend in Supreme Court decisions, the 1938 Act was passed re-establishing federal control over the program.

MARKETING AGREEMENTS

In addition to the program for production control of "basic" commodities, various powers were given to the Secretary of Agriculture under the original Agricultural Adjustment Act and amendments to regulate the marketing of the available supply of agricultural products, as a means of increasing farm prices to the parity level. The Secretary was empowered to enter into marketing agreements with distributors and processors and associations of producers, no conditions being laid down as to

these agreements, except that they should only be entered into after due notice and opportunity for hearing from interested parties. Marketing agreements were exempted from provisions of the anti-trust laws.

Independent of the marketing agreement provision, but in fact used to support it, was a provision empowering the Secretary to license handlers and associations of producers. Such licenses were "to be subject to such terms and conditions not in conflict with existing acts of Congress as may be necessary to eliminate unfair practices or charges that prevent or tend to prevent the effectuation of the declared policy and the restoration of normal economic conditions in the marketing of such commodities or products and the financing thereof." The Secretary was empowered to revoke a license after due notice and hearing.

Following the Schechter decision of the Supreme Court, May 1935, invalidating the N.R.A., the Agricultural Adjustment Act was amended in certain respects to help it escape a like fate. The power to issue licenses, which could be revoked, was replaced by a power to issue orders, the violation of which was subject to fines. The terms to be included in the orders were laid down very specifically, and the commodities that might be made subject to an order were limited by specific reference. The marketing agreement provisions, as amended, and later embodied in the Marketing Agreement Act, 1937, have survived judicial attack. In 1938, the new Agricultural Adjustment Act went much further in the effort to establish "orderly marketing" of farm products, and, under certain circumstances, empowered the Secretary to establish marketing quotas for basic commodities as part of the "ever normal granary" program.

From the beginning, the marketing aspects of the agricultural program have been supported by a system of commodity loans to farmers which enables them to hold their products off the market when prices are considered unfavorable. Increasing importance also has been given to diversion of "surpluses"

into the export trade or into domestic channels not in competition with the regular channels of trade—for example into by-products or to people on relief. In the 1935 amendments, funds to the extent of 30% of the tariff revenue were made available to the Secretary of Agriculture for this diversion program, to which increasing attention has been given.

The extensive provisions for farm financing to relieve the pressure of farm mortgages, which have been made since the depression, are not relevant to this discussion, as they have been administered by the Farm Credit Administration, and the Consumers Counsel, A.A.A., has had no function in connection with them.

The above summary review of the general and specific features of the agricultural adjustment policy laid down by Congress has seemed necessary before considering the part played in giving effect to that policy by the Consumers Counsel. The work of his Office has been necessarily limited by the statutory framework within which the A.A.A. has operated.

THE CONSUMERS COUNSEL, A.A.A.

The first Agricultural Adjustment Act became law on May 12, 1933. George N. Peek, who had been selected to administer the act, under Secretary Wallace, set up the Agricultural Adjustment Administration as rapidly as possible, for the season was already advanced.

The desirability of having the consumer interest represented in the A.A.A. "as an offset to the pressure groups from business and producers," was urged on the Secretary by some of his personal advisers, and the idea had his approval, and the approval of the President.⁴ Peek, however, was opposed to it, and took no action in the matter until after special pressure had been brought to bear by the Secretary, early in June.

There was need, according to the view of the Secretary, to administer the act with scrupulous regard for the rights of all interested parties, including producers, consumers and pro-

⁴ Correspondence with Mordecai Ezekial, Dept. of Agriculture; see also address by Mordecai Ezekial, at Chautauqua, N. Y., August 1, 1935.

cessing and distributing agencies. Two administrative divisions for the adequate representation of the producer and distributive interests had already been established in the A.A.A. These divisions were headed by men who had broad experience and sympathy with these interest groups. If policy decisions were to be justified before Congress, however, the record would need to show that equal consideration had been given to the consumers' interest. The Secretary therefore suggested to Peek the necessity for creating within the A.A.A. a unit specially charged with examining each proposed action from the consumer point of view, and staffed and equipped to carry out the necessary accounting, statistical and economic investigations as a basis for its reports.

The A.A.A., it must be noted, was not operating with administrative machinery similar to that in the N.R.A. The consumer agency suggested by the Secretary was not an unpaid advisory board with a staff of paid experts, but an administrative unit of paid officials whose duty it would be to represent the consumer interest in formulating the agricultural program.

On June 27, Frederick C. Howe was appointed with an undefined status to head up what was at first known as a "trade agreements division" since it was expected that the Consumers Counsel would function mainly in connection with the marketing agreements program, and the group of N.R.A. codes which had been transferred the day before to A.A.A. jurisdiction. An administrative device for securing representation of the consumer interest was thus set up, not by executive order, nor administrative order, but simply by the appointment of Dr. Howe to the staff of the A.A.A. by the Administrator.

In his book *Why Quit Our Own*, written in 1936 after he had left the government service, Peek declared that the two great mistakes he made in setting up the A.A.A. were, firstly, accepting Jerome Frank as General Counsel, and secondly appointing Frederick C. Howe as Consumers Counsel.⁵ Howe

⁵ *Why Quit Our Own* by George N. Peek with Samuel Crowther, 1936, p. 107.

was a Wilsonian Democrat, who had behind him a long history as a reformer in municipal administration. Lincoln Steffens wrote of him in his *Autobiography* as a man "who spoke my language."⁶ He had held office under Wilson as an immigration commissioner at Ellis Island, had written a study of co-operatives in Denmark and generally was a well-known publicist and lecturer on many subjects with a liberal reform point of view. He had been politically active in the 1932 Presidential campaign and was known to some of Wallace's advisers and also to Peek's friend and Co-Administrator, Charles Brand. But Peek, writing out of a later bitterness, said that Brand did not know Howe "had been seriously bitten by some kind of pink bug and had accumulated a hazy half radical, half uplifter set of views and attitudes."⁷

The main interest in these circumstances of Howe's appointment is that there was no drive for it from unofficial consumer groups, and no attempt was made to consult consumer leaders as to an acceptable representative from a consumer point of view. It was fortunate for consumers that Dr. Howe was vigorous in pursuit of the consumer interest as he conceived it, and had great integrity of purpose. Like Mrs. Rumsey, he was promotional rather than administrative in capacity, somewhat given to generalities, but with a deep emotional drive toward an abundant life for everyone. In line with his experiences in earlier endeavors to promote the public interest, Dr. Howe found himself, among others, a victim of the "great purge" of February 1935, when Secretary Wallace found it necessary to take what he described as a middle of the road course.

Howe was succeeded as Consumers Counsel (or, technically, as Director of the Consumers Counsel Office) by Dr. Calvin Hoover, a professional economist on leave from Duke University, who had been for some time attached to Secretary Wallace's staff. Hoover returned to Duke University in the fall of 1935, but his short regime was significant in that, fol-

⁶ The autobiography by Lincoln Steffens, 1931, p. 471.

⁷ *Op. cit.*, p. 107.

lowing the purge, it was necessary that the functions of the Consumers Counsel should be more clearly defined and an attempt made to resolve the theoretical and administrative problems involved in having a representative of a consumer point of view on the staff of the Department of Agriculture.

Hoover's assistant, Donald E. Montgomery, who had had previous experience in the Federal Trade Commission, succeeded to the position of Consumers Counsel, and still serves in that capacity.

Over this seven-year period, there has been some change in the administrative status of the Consumers Counsel. Dr. Howe was at first in an independent position under the Administrator, enjoying a status similar to that of the General Counsel, though with a much smaller staff. When an administrative reorganization took place following Peek's resignation in December 1933, the Consumers Counsel Office became a section in the Division of Information under the supervision of Alfred D. Stedman, the Director of Information. Following Howe's removal in the spring of 1935, the status of the Office was advanced to that of a division. Under Mr. Montgomery, it has continued as a division, but its future status has been made uncertain, following a recent major reorganization of the Department of Agriculture which has tied the A.A.A. more closely in with other bureaus of the Department. As a result, it seems likely that the functions of the Consumers Counsel will be written out in terms of the total program of the Department of Agriculture, rather than merely of the program of the Agricultural Adjustment Administration, though the actual status of his Office may be diminished.

In writing the story of the Consumers Counsel, and the Consumers Counsel Office, it is important to emphasize again that unlike the Consumers Advisory Board of N.R.A. where the responsibility for the work of the Board was vested finally in the unpaid members, the Consumers Counsel was himself a paid member of the staff of the A.A.A. and an integral part of it, personally responsible for the work of his Office in de-

veloping a consumer viewpoint towards the agricultural program, and in endeavoring to further it. The Consumers Counsel himself therefore became the main target for any opposition that developed. Further, there has been nothing comparable in the development of the agricultural program to the Advisory Council of the N.R.A. The pressure of special interest groups, both of farm groups and of handlers of farm products, has therefore been more direct and unchecked. It is inconceivable that the Consumers Counsel Office could have survived the waves of opposition directed against it at different times had it not been for the support given it in the past by Secretary Wallace. There are some indications at present, however, that he considers this child of his creation a baby Frankenstein.

Since the role of Consumers Counsel has differed considerably during the regimes of the three men who have held that office, it is convenient in describing it in more detail to consider the regimes separately. This procedure will also indicate the importance of personality in such experimental administrative developments.

HOWE'S REGIME

The first thing to note about Howe's regime (June 1933 to February 1935) is that he had no opportunity to take a position on the general production control program, the importance of which is indicated by the fact that during this period a total of 3,700,000 production control contracts were made with individual growers of basic commodities. This program had been developed in general outline before Howe was appointed, and no procedure was worked out for submission of individual crop-control programs for his inspection. For a short period after he took office, Howe attended the brief daily meetings of the responsible administrative heads which constituted an informal administrative council, but, as is so often the case in active administrative work everywhere, these meetings were soon abandoned. On occasion, he tried to exert an indirect influence on the control program, as for instance in the Spring

of 1934 when he took the initiative in arranging with a number of women's organizations to urge the Secretary to make a survey of per capita milk consumption by families of school children in a number of large cities, at the time when the Secretary was outlining a plan for reduction of the milk supply. But in the general controversy on ploughing under cotton, the "slaughter of the little pigs" and so on, he had no official part, except in explaining it to consumers, and in publicizing any undue advantage taken of this control program by the "middlemen."

As pointed out above, the Secretary was given a statutory responsibility to make public certain information concerning the effect that the control program, together with the processing tax, might reasonably be expected to have on retail prices, with a view to discouraging any undue pyramiding of price by processors and distributors. The question was what under the circumstances was a fair increase in price?

Soon after Howe took office, Secretary Wallace handed over to him the job of determining what was a fair price increase for bread, and of publicizing it effectively. Howe was also asked to answer the complicated question of what was a fair increase in the price of a cotton shirt, taking into consideration both the A.A.A. and N.R.A. programs. A statistical staff and a public relations staff were built up in the Consumers Counsel Office to handle these questions, and there were busy periods of conferences with the industries concerned.

To get effective publicity, various techniques were developed. Howe held a weekly press conference. A weekly radio broadcast on a nation-wide hook-up was arranged through the General Federation of Women's Clubs, and time was also made available on the regular Farm and Home Hour. A third technique was to develop local contacts through correspondence and interviews, and an attempt was made to encourage mayors in a number of cities to create consumers' councils to check local profiteering; this plan was later taken over by the Consumers Division, N.E.C. A fourth technique, and the one that has had

the most permanent influence, was the publication of the semi-monthly *Consumers Guide*.

In a letter accompanying the first issue of the *Consumers Guide*, which appeared in September 1933, it was stated that: "Consumers are being asked to pay higher prices for food. They want to know why. They want to know how much of these price increases is fair, and who is getting the benefit of them. The *Consumers Guide* is designed to answer these questions. It gives facts on retail prices in 51 cities for 16 representative foods. It shows differences from city to city, the cities that have increased their prices more than the average, and are charging a higher total price than customary." Mary Taylor, an experienced journalist, became, and continues to be, editor of the *Guide* and is largely responsible for its success.

In attempting to prevent profiteering in the distribution of farm products, the Consumers Counsel was of course also protecting the farm program from undesirable opposition among consumer groups. This no doubt accounts in large part for the fact that A.A.A. officials permitted such active publicity on the part of the Consumers Counsel at a time when the Consumers Advisory Board was struggling for the right to give public expression to its views. But when the Consumers Counsel Office began to take a definite consumer position, particularly with reference to the marketing agreement program, any attempt to use the publicity instruments it had fashioned, to strengthen its position on particular issues raised by the program was met with as vigorous a censorship as was ever exercised by the N.R.A. This continued to be a matter of dispute until the 1935 "purge."

During Howe's regime, the Consumers Counsel Office exercised a "representative function" most directly in connection with the marketing agreement program and the group of N.R.A. codes under A.A.A. jurisdiction. It was on this front that conflicts developed which were largely responsible for two major reorganizations of the A.A.A. The first major reorganization followed the removal of Peek as Administrator in

December 1933. The Consumers Counsel Office played a part in the drama leading up to that event.

The Peek Controversy

Peek and his friend Charles Brand, whom he appointed as Co-Administrator, had for a decade headed up the movement for the two-price system embodied in the McNary-Haugen proposals that were twice accepted by Congress and twice vetoed by the President in 1927 and 1928. These proposals were, briefly, that surplus production should be taken off the domestic market in order to maintain a fixed domestic price, and exported at the world price, or converted into by-products. There was to be no production control tied to this government-supported price program. These proposals were of course more satisfactory to the handlers of farm products than proposals for controlled production, which would reduce the handling business. They were also more satisfactory to the agricultural machinery business with which Peek and his friend General Hugh Johnson had been connected. But the Government feared that "dumping" of products abroad at less than the domestic price would have an undesirable effect on international relations and the McNary-Haugen proposals were consistently headed off. They were partly salvaged however, in the marketing agreement provisions of the Agricultural Adjustment Act, 1933, which were included in the bill under the influence of Peek with the support of a number of producer cooperatives handling the distribution of fruits and vegetables—products not included in the production control scheme.

Peek was of the opinion that through marketing agreements with processors and distributors a quick result in increased farm prices could be obtained, and a satisfactory method for controlling the "surplus" worked out. An important inducement to the handlers to cooperate was contained in the provision exempting marketing agreements from provisions of the anti-trust laws. In this connection, and with some bearing on the future, it is interesting to note that efforts made by middle-

men interests to rouse consumer opposition to the processing tax provisions of the production control scheme, suddenly stopped after these marketing provisions were included in the bill.

Peek was very anxious to conclude a series of marketing agreements before the production control programs were put into operation. He might in this way make it unnecessary for these programs to be put into operation at all. He was in fundamental opposition to the Secretary on the question of production control.

But his efforts at speed were frustrated, due in part to opposition from officials on his own staff. Peek had himself drawn attention to the large corporate profits that were made by the food trades even during the depression when farm prices were at their lowest in American history. But at the moment he was anxious for cooperation with the trade and had encouraged his Co-Administrator, Charles Brand, to set up an advisory committee of members of the food industries, the Food Industries Advisory Board.⁸ He was supported in this action by leaders of some of the most powerful farmers' bargaining cooperatives, particularly in the milk industry, who believed there was more advantage in cooperating with the trade to their mutual interest than in making an attack on distributive practices and profits. The Consumers Counsel took a different position.

A group of economists had gradually been brought together in the Consumers Counsel Office to analyze the provisions of marketing agreements and codes and develop a consumer point of view in regard to them. Dr. T. Blaisdell, a professional economist who had studied the operations of the Federal Trade Commission and was familiar with this type of analysis, was in charge of this work. A large number of agreements and codes were already under consideration by the A.A.A. when the Consumers Counsel staff was set up, and the conditions under which a consumer policy had to be developed were as

8 See *Why Quit Our Own*, p. 145, for personnel of the Board.

hectic as in the early days of the Consumers Advisory Board, N.R.A.

The Consumers Counsel Office was not as articulate in expressing general policy as the Consumers Advisory Board and did not prepare such illuminating memoranda as the statements presented at the N.R.A. price hearings, and the policy guides. But an analysis and report were prepared for each agreement and code under consideration, testimony was presented by representatives of the Office at each public hearing, and there are a number of statements prepared for different occasions by officials of the Consumers Counsel Office which, combined with personal interviews, make possible an understanding of the basic issues raised in the development and presentation of a consumer point of view with reference to the agricultural program.

The program, it must be emphasized, had as its statutory objective the raising of farm prices, and consumer policy had to be developed on that basis. The Consumers Counsel Office felt, however, that the influence of the program on retail prices should be minimized as much as possible. The large corporate profits of the food industries suggested a possibility of improving the farmer's position without proportionately weakening that of the consumer. There was also the possibility of reducing the spread between farm and retail prices, by improving wasteful and expensive distributive practices.

The problem of the spread had been a matter of lively interest to farm leaders themselves for a long time. To "reduce the spread" was a means by which the Consumers Counsel Office could protect consumer interests under a rising farm price policy. Representatives of the Office were therefore particularly concerned about proposals for fixing retail prices of farm products by agreement at a level that would in effect protect the existing profits of the processing and distributive trades or even increase them. They were also concerned lest the exemption of agreements and codes from the anti-trust laws would be seized upon as an opportunity to eliminate competition in these

trades, some of which, for example the tobacco and meat industries, had already been brought under the scrutiny of the Department of Justice.

"In essence," explains Gardener Jackson, a former member of the Consumers Counsel Office, "our position was that the forces of competition should be encouraged and kept open whenever possible in order to hold distributors' and processors' margins within reason and thus protect the consumer."⁹

As some guarantee of consumer protection against the misuse of exemption from the anti-trust laws, the Consumers Counsel Office insisted that a clause be inserted in all agreements and licenses providing for full reports of company operations, and giving the Secretary of Agriculture right of access to all books and records whenever he felt it necessary to check up on these reports. This matter of access to records came to symbolize the fundamental issues involved in the controversy that developed over the marketing program. On this question the Consumers Counsel Office was supported, or even led, by the General Counsel to the A.A.A., Jerome Frank, with the approval of Assistant-Secretary Tugwell, all of whom were classed together by Peek¹⁰ as economic theorists opposed to the profit-system without knowing what they wanted to put in its place. It is obvious, however, that the position taken by this group in the A.A.A. was in line with the long-accepted American anti-trust policy.

The point of view of the Consumers Counsel Office in this controversy seems to have been as follows. It was the responsibility of the Secretary to decide whether and on what terms he would continue to grant exemptions from anti-trust suits and the protection such exemptions gave from competitive pressures. It was not a question as to whether the Secretary should regulate profits, but whether he should continue to protect profits that might be exorbitant from the operation of the anti-trust laws. He should have the necessary information

⁹ *Sunday Star*, Washington, D. C., March 3, 1935.

¹⁰ See *Why Quit Our Own*, p. 107.

to determine whether the protection from competition given under the agreements to the processing and distributive trades was in the public interest, in the interest of the farmers and consumers (including the farmers as consumers). A study that had been made of the profits of milk distributors in Philadelphia illustrated the difficulty of determining the true financial position of a company without a complete investigation. This study had revealed that what was apparently a small margin of profit per unit in milk distribution showed up as an exceedingly large profit on invested capital. The rate of profit in an industry cannot be known from a knowledge of the spread nor even from operating statements, argued representatives of the Consumers Counsel Office, since there are so many ways of concealing profits, particularly through a subsidiary or affiliate. The absence of anti-trust suits in the past indicated that there was no adequate legal proof of "unlawful restriction of competition," but not that such restriction did not exist. In answer to the question why should the Secretary, acting in the interest of farmers, care whether or not he was protecting and helping to maintain unreasonably high profits to processors and distributors if they in turn were willing to increase prices to farmers, it was argued that the welfare of the farmers is tied up inextricably with the welfare of other consumers, for if the power of the city consumer to buy the products of the farm is reduced, the farmer is injured, and any other point of view is shortsighted. It was admitted that the Consumers Counsel staff was not adequate to examine all books and records of the industries concerned but it was argued that they could make spot checks, or that arrangements could be made with other agencies of the government to carry out this task. Moreover even the right of access to information might itself be helpful in bargaining with the industries on the terms of marketing agreements.

In *New Frontiers*, Secretary Wallace supported this position in the case of agreements providing for fixed retail prices. "If it seems wise," he wrote, "for the central power of a

democracy to give a group of corporations the power to fix prices then it is also wise for the government to have complete access to the books and records of such corporations. . . . Farmers and consumers are tremendously interested in knowing just what conditions justify government in permitting business to substitute group price-fixing for competitive price-fixing.”¹¹

But from Peek's point of view, as an administrator anxious to get the marketing agreement program through, the position taken by the Consumers Counsel Office was clearly obstructionist. “We had,” he complained, “to fight for recovery as against reform.”¹² There was a bitter cleavage right through the A.A.A. on this issue of access to records, the heads of the commodity divisions in the marketing section in the main supporting Peek in his endeavor to get the marketing program through on such terms as he could make with the distributive and processing interests. One complicating factor was that no similar provision was included in codes under the N.R.A.

The forces and ideas opposed in this issue of access to books and records are well shown in the story of the marketing agreement made in 1933 for flue-cured tobacco. Farm prices for tobacco were disastrously low when the A.A.A. took under consideration a production control program for the 1934 tobacco crop. Meanwhile, and in view of this program, it was hoped that an agreement could be made with the tobacco manufacturers to raise farm prices while holding retail prices steady. It was well-known that despite the distressed condition of the farmers, the corporate profits of the tobacco companies were very high and some company officials were drawing salaries of six and, in one instance at least, of 7 figures. There were many conferences in which it was suggested that the companies should undertake to pay a price that approximated parity for the 1933 crop, and that they should keep the prices of manufactured products down to those of September 1933, unless the

¹¹ *Op. cit.*, pp. 32-33.

¹² *Why Quit Our Own*, p. 140.

Secretary gave his approval for an increase. Various trade practice provisions desired by the industry were to be included in the agreement, and it was to be exempt from the provisions of the anti-trust laws.

In the A.A.A., the General Counsel and the Consumers Counsel insisted on the inclusion of a books and records clause in the tobacco agreement, which the industry refused to consider, asserting that it was an attempt at government control of their business. Industry representatives demanded on their part a self-denying clause in which the A.A.A. undertook not to interfere in their business. There was a bitter conflict between Peek and the Secretary, centering in Peek's demand for the dismissal of Jerome Frank as leader of the "collectivist group," which, he declared, was making "a drive to take over control of the industry."¹³

Peek decided to take the issue to the President "for, unless the drive to control business were halted in the department we were going to get just nowhere in helping the farmer through marketing agreements."¹⁴ As an outcome of the Presidential conference in which a number of cabinet officers took part, it was agreed that a "limited" books and records clause should be used covering only such information as was necessary to determine whether an agreement was being carried out. The President is reported to have said: "We are fighting on too many fronts, Henry." But Jerome Frank was retained. Finally an agreement was approved in which the tobacco industry undertook to buy a quantity of the product, at least equal to that of the previous season, at an agreed minimum price and to hold the manufactured price at the January 1933 figure plus any actual increase in costs. Certain trade practice provisions were included, and a limited books and records clause. The Secretary approved the agreement, subject to the written comment (with reference to the limitation on access to information): "it being of course obvious that no officer of the gov-

¹³ *Ibid.*, p. 146, *passim*.

¹⁴ *Ibid.*, p. 147.

ernment can by agreement limit or curtail any authority vested in him by law, nothing contained herein shall be construed by the parties to the agreement as attempting to limit or curtail such legal authority."

The tobacco agreement was not renewed in the following season. Moreover, agreements which Peek had been anxious to complete with a number of other industries, particularly the meat packing industry, in order to obviate if possible any control program for corn and hogs, had to be dropped because of opposition from the processors, intensified by the attitude of the General Counsel and Consumers Counsel on the subject of books and records.

Meanwhile another issue had arisen to stimulate the opposition of some processing interests, and particularly the canners, to the "economists" in the Adjustment Administration. This had to do with the promotion of quality grades for farm products.

The Department of Agriculture had for some time been working on the basic problems of grading farm products and, as pointed out above, grades had been worked out and were actually in commercial use for a number of products, though many of these were not entirely suitable for the retail trade. They were, however, considered suitable in the case of canned goods. The Consumers Counsel Office was hardly organized and in no position to argue forcefully on any particular issue when the cling peach canners agreement was under consideration by the A.A.A. Nevertheless, before the agreement was approved, early in July, Dr. Blaisdell urged Administration officials to support an amendment proposed at the public hearing on the canned peach agreement by Miss Alice Edwards of the American Home Economics Association, to the effect that consumer grades for canned peaches should be made compulsory. Dr. Blaisdell was of opinion, following conferences with some of the canners, that if the Administration took a firm stand at the beginning, such an amendment would be accepted and would become a helpful precedent. The marketing

division handling fruits and vegetables was not prepared to take such a stand, however, and suggested that the question be held over until the General Canners' Code was under discussion.

In preparation for conferences on the General Canners' Code, Howe arranged in August 1933 for the setting up of a departmental committee, including representatives of various interested bureaus, to consider the suggestion for compulsory grade labels and make a recommendation on it. It was hoped that in this way the officials concerned with the agreement could come to an understanding and present a united Administration front on this issue. The Committee agreed "that the canners' code should provide that labels should be conspicuously marked as Grade A, Grade B, or Grade C as the case may be, if grades have been promulgated by the Department. . ." But the united Administration front was not achieved. The disagreement among Administration officials was shown at an informal conference of representatives of parties interested in the General Canners' Code held on September 19, at which it was made clear that the National Canners Association would vigorously oppose any attempt to institute an effective system of grade labels for canned goods. No progress was made for compulsory grades under this code before it was transferred to what, in the opinion of the industry, was the more satisfactory jurisdiction of the N.R.A. This was part of the price paid for Peek's removal as Administrator.

The immediate cause of his removal was the failure of the fluid milk agreements. During the first six months of the A.A.A., proposals had been made for hundreds of milk marketing agreements covering fluid milk in different cities and towns throughout the United States, though only fifteen of these were actually carried through to completion. The provisions of these agreements differed in different markets but in the main they reflected an understanding between the large milk distributors and leaders of the cooperative bargaining associations to the effect that farm prices should be raised and at the same time

retail prices should be fixed, thus stabilizing the existing distributive margins. Representatives of the Consumers Counsel Office vigorously protested against the stabilizing of existing margins which they believed to be too high.

Licenses were issued in each milk market where an agreement was approved, as a result of which any distributor who violated the terms of the agreement was under threat of having his license revoked. But the legal division of the Department of Agriculture, and the Department of Justice were unwilling to recommend action to revoke a license, when retail price provisions were violated, since it was difficult to establish that such prices were essential to effectuate the policy of the Agricultural Adjustment Act, namely the raising of farm prices. Under such circumstances retail price provisions could not be effectively enforced. The Consumers Counsel Office urged that retail price fixing be abandoned. In the opinion of the industry, however, it was "one of the essential pillars of the marketing agreement structure." This structure, built up with painstaking effort by Dr. Clyde King, head of the Dairy Division of A.A.A., with the support of Administrator Peek, now seemed in danger of collapse.

Meanwhile Secretary Wallace had agreed to buy up surplus butter to maintain butter prices, and so keep butter producers from diverting part of their milk supply into the fluid milk market, but he supported Assistant-Secretary Tugwell in his refusal to act on Peek's advice to permit the dumping of some of this surplus butter abroad. The Secretary was convinced that the only remedy was some form of production control in the milk industry. So the Secretary and Peek were again at issue on this fundamental problem, except that now Peek was in a weak administrative position due to the threatened failure of his marketing agreement program, particularly with reference to fluid milk. Peek was asked by President Roosevelt to accept another position in the government and on December 11 he left the A.A.A. with a number of his assistants.

It was not, however, an unqualified victory for his opponents. Most of the N.R.A. codes which had been placed under the jurisdiction of the A.A.A. were transferred back to the N.R.A. by Executive Order issued January 9, 1934. Moreover in a memorandum to General Johnson dated December 28, 1933, Secretary Wallace agreed that codes of fair competition for the limited number of industries to be left under A.A.A. jurisdiction, should be drawn in harmony with the policy of the National Recovery Administration. "As illustrative, it will be understood that codes which remain with me will contain no provisions for *examination of books or consumers' grades* except as you may from time to time agree, and will contain provisions as to limitation of *plant capacity*, and as to the *powers of the representative of the government* with respect to the Code Authority equivalent to provisions relating to those subject matters contained in comparable codes approved by you."

Something over a year later Frank, Howe and a number of their assistants were themselves removed from office. To get a broad picture of the different currents of opposition that finally merged into a stream strong enough to sweep away these "economists," it is necessary to follow in more detail the history of some of the more important marketing agreements and licenses.

Milk Marketing Agreements

These agreements fell into two main groups, those relating to fluid milk and those relating to the distribution and processing of fruits and vegetables, particularly from such specialized growing areas as California and the Southeast. Agreements covering the fluid milk markets constituted the most important group, and Dr. Blaisdell and his assistants devoted considerable time to them. Dr. Howe was also personally interested in the milk problem, especially in its more general aspects.

The distribution of milk to large city markets under modern conditions is a very complicated matter and its regulation is

difficult. In many areas farmers have organized powerful bargaining cooperatives to represent their interests in dealings with the distributors, and in some cases officials of these cooperatives have developed fixed ideas on policies and programs. In most large markets there is a long history of negotiation and arrangement between the cooperatives and the large distributors with respect to the handling of milk and payment for it.

Distributors of fluid milk as a rule have to handle a surplus which is diverted into cream and manufactured products at a price lower than that obtained for fluid milk, though as a matter of fact some of the large profits made by milk companies have come through handling "the surplus." There is an important question on what basis to pay the individual farmer for milk, part of which goes into the fluid market and part into surplus, and this has led to the development of the "class-price" system of payment, different prices being set according to the use made of milk.

In some markets attempts have been made to regularize the annual supply of milk by fixing a base price for a quantity equal to that produced by the farmer in the winter months, and a lower surplus price for an additional quantity produced at other times of the year. This is known as the base surplus system. This system has been extended to include arrangements by which a definite base quantity per month is allocated to each farmer. For this he gets an agreed price; any surplus he produces is paid for at a lower price.

Systems of payment for milk coming on a highly organized city market are often further complicated by pooling arrangements, the object of which is to ensure equal returns to farmers (with deductions for freight and so on) irrespective of whether the dealers are able to put a larger or smaller percentage of their supply on the fluid market. Dealers with a high fluid milk percentage pay into a pool and those with a lower percentage take out of it, in order to equalize farm payments.

Other problems in marketing milk have arisen in connection with attempts made to limit the total supply of milk coming on

a market, particularly by establishing a cordon around a producing area through the cooperation of the local health service. As a result of this cooperation, producers outside the agreed limits of the milkshed are unable to obtain the health inspection required before they can send supplies on the market.

Then there are problems connected with methods of distribution, one of the most important of which, from the consumer's point of view, arises from attempts made by established distributors to keep independent distributors from breaking in on the market. An example of this, is the attempt that has at times been made by arrangement with the producer cooperatives to prevent store dealers and peddlers from selling milk at a lower price than that agreed upon for wagon deliveries.

Because of the constant conflict in the distributive field, and to some extent because of attempts by new producers to get in on a good market, arrangements made between officials of producer cooperatives and distributors have frequently been difficult to maintain. Both groups therefore welcomed the opportunity offered by the license provisions of the Agricultural Adjustment Act to establish more effective market control. These groups connected with the dairy industry are highly organized politically and are able to bring considerable pressure on the Department of Agriculture, not only directly but also indirectly through Congress.

When the Agricultural Adjustment Act was passed, hundreds of representatives of different interests from a large number of milk markets surged round the offices of the Adjustment Administration in an effort to hasten the conclusion of milk marketing agreements. But there were long delays and by December 1933 only fifteen agreements with accompanying licenses had been put into effect for fluid milk markets, though these covered the major markets, except for New York City. These agreements for the most part were based on the marketing structure already existing in the individual markets, or that had existed before bad times struck even the dairy industry, which weathered the early stages of the depression very

well. The first of these agreements signed was that for the Chicago milk market, and the provisions of the Chicago agreement and its subsequent history illustrate the basic issues involved in the milk program.

About 90% of the producers of the Chicago milk shed were organized in the Pure Milk Association, and groups of distributors were represented through the Milk Council and the Chicago Milk Dealers Association. Representatives from these organizations conferred with Secretary Wallace the day the Act was signed (May 12, 1933), and public hearings were held on June 5-6. The terms of the agreement were informally approved before the Consumers Counsel was appointed, though the agreement did not become effective until August 1.

The Chicago agreement provided a full schedule of prices to producers for different classes of milk according to use. Limits were fixed to the milkshed within which a production "base" would be allotted to producers, the area coinciding in the main with the limits fixed by the Board of Health for sanitary inspection. Distributors agreed to get their supplies of both milk and cream from producers with an allotted "base." New producers within the area were required to get a "certificate of necessity" before they could have a production "base" allotted them. To enable all producers in the milkshed to share equitably in the fluid milk market, provision was made for the setting up of an equalization fund contributed to, or drawn from, by distributors according to the percentage of their milk that went into the fluid market as distinct from the surplus market. The retail price of fluid milk was fixed and no differential was allowed between store and wagon deliveries. There were also a number of trade practice provisions relating to illegal concessions, secret deals and so on. The Secretary was given the right of access to books and records.

A blanket license was issued to all distributors who had not signed the agreement (about two-thirds of the total number handling about one-third of the supply), obliging them to buy only from farmers to whom a base quota had been allotted, and

to maintain the farm and retail prices fixed in the agreement. A violation by any distributor might lead to his having his license revoked. On the face of it, this was a very powerful instrument of control.

Though the Consumers Counsel Office had not had an opportunity to consider this agreement in its formative stages, the staff followed its operation, participated, so far as opportunity offered, in the discussions leading up to other milk agreements, and gradually developed a point of view on the issues involved, which was expressed formally at public hearings and in occasional statements by Dr. Howe and Dr. Blaisdell. A statement, dated December 21, 1933, prepared by Einar Jensen and Robert S. Ford, economists of the Consumers Counsel staff, also helps to clarify the position taken by the Consumers Counsel Office.

Representatives of the Consumers Counsel Office were of opinion that consumers had nothing to gain in the long run from the continuance of a demoralized milk market. The consumer interest required sufficient stability of production and distribution to secure an adequate and regular supply of good milk. But they opposed the rigid limitation of the production area which would give a group of local producers an exclusive franchise to supply a particular market, and they also opposed any rigid restriction on the issuance of certificates of necessity to new producers. Cities should not be prevented directly or through the instrumentality of health inspection from drawing their supplies of milk and cream from areas where these products could be produced most cheaply. In public hearings held in Chicago in November 1933 with reference to violations of the milk license, the Health Commissioner stated that he would grant no new permit to any producer so long as he thought that the quantity of milk supplied to the city was "sufficient." It was clear that the power of inspection might easily become an instrument of monopolistic control. Moreover, argued Consumers Counsel representatives, the federal government was concerned with the welfare of all dairy

farmers, whether they were within or outside established milk sheds. It was considered probable that under the agreement milk products prepared from the uncontrolled "surplus" milk would be thrown on the national market, depressing the general price level for milk products and increasing the instability in the dairy industry.

The Consumers Counsel Office directed most of its attention, however, to the price schedules. They approved a schedule of producers' prices based on a "use" classification, providing the differential between the prices was reasonable and related to the fundamental economic differences surrounding the formation of prices of milk, cream and other dairy products. This schedule, they pointed out, called for an efficient system of checking distributors' returns showing the use they made of the milk supplied them. The equalization fund was an equitable arrangement in general, though, the Jensen and Ford statement pointed out, "it may be applied and sometimes is applied in a way which gives rise to very inequitable treatment of different groups of producers and distributors who have local advantages in supplying the fluid market."

The most vigorous controversy developed round the fixed retail prices. In this controversy the Consumers Counsel Office found itself in opposition to the Dairy Section in the A.A.A., as well as to the private distributing interests and officials of the cooperative bargaining associations. "It has been our contention consistently," wrote Jensen and Ford in their memorandum, "that the resale prices have been set too high, creating altogether too wide dealers' spreads in comparison with actual costs of handling the various items, that is milk, cream, cottage cheese, etc., by reasonably efficient distributors. It is extremely difficult to ascertain what actually is the fair price in each market, and the Consumers Counsel has held the opinion that no attempt to fix actual (resale) prices should be made, but that the agreement should be set up in such a way as to leave it to competitive forces to work out the proper prices. Although we have been opposed to price-fixing as such, we

have in a number of agreements made specific recommendations for minimum prices considerably below the proposed fixed prices. Such minimum prices still provided for a reasonable dealer's spread based on our knowledge of what margins are necessary for reasonably efficient distributors." They argued that it was to the interest of the farmers to ensure a high level of consumption by keeping retail prices as low as possible.

Another feature of the price schedule opposed by the Consumers Counsel Office related to the differential between store and wagon prices. In most agreements no provision was made for such a differential. "In practically every agreement," wrote Jensen and Ford, "we have recommended that such a differential should be included in the price schedule if . . . [it] has prevailed in the market prior to the Agreement . . . When consumers could obtain no advantage in price by going to the stores and themselves performing part of the delivery service, they would of course turn to wagon delivery instead. The Agreement thus in a perfectly arbitrary manner is used as a tool to do away with the store business, and force the milk business back into the hands of the wagon distributors. It is contended that when this has taken place and the volume of sales of the wagon distributors are increased, their costs are lowered and they will be giving the benefit to the consumers in the form of lower prices. What spoils this argument, however, is the fact which has been shown up in one market after another that at such time when all the milk business was in the hands of the wagon distributors the spread was a wider one than now prevails . . . From the general point of view, the increase of the price to those consumers who patronize the stores constitutes an especially bad feature because the store customers represent that part of the consuming public which has to consider expenditures most closely."

The Consumers Counsel Office also opposed the high margins on cream provided for in the price schedules which in almost every case they considered "exorbitant." The margins were

defended on the grounds that cream is a luxury, an argument which the Consumers Counsel Office opposed as being disadvantageous both to producers and consumers. "It is a glaring anomaly that at the same time that high grade butter is selling in the wholesale markets at record low prices (16 cents a pound), it is impossible for consumers in our large cities to buy cream because of the exorbitant margins charged by distributors which cause a half pint of cream that contains butterfat to the value of 2 cents and on which a handling cost of from 4 to 6 cents is incurred to be sold at prices anywhere from 12 cents to 19 cents. On a half pint of heavy cream dealers' margins are still wider," wrote Jensen and Ford.

In principle the Consumers Counsel Office opposed the fixing of retail prices and particularly the fixing of prices on the basis of alleged "costs" and even on costs as revealed by a cursory examination of books, as was done in Chicago at the time of a revision of the price schedules. The auditor in charge of this examination later admitted, on questioning, that the figures used were incomplete, and should not have been used as the basis for price increases. "It is our own feeling," wrote Jensen and Ford, "that any tendency to utilize accounting as a basis of price fixing should be discouraged at the very beginning. Otherwise we shall encounter the same difficulties as have arisen in the case of the public utilities. Although recognizing that the provision for full and complete access to the books of distributors is of great value, we maintain that audits should be made in the different markets to ascertain the cost of the most efficient distributors, and if any price-fixing at all is made, the Government should guarantee the maintenance of only those prices which correspond to the cost of efficient distributors. Only sales at prices less than such costs can be termed destructive price cutting. If new agencies are able and want to distribute at lower prices and can do so without underpaying farmers and labor, and without lowering quality to consumers, the minimum prices should be decreased correspondingly. Improvement of distributive practices should thus be encouraged to the fullest degree."

The Consumers Counsel Office had also to take a position on the subject of grades for milk and cream, not so much in the promotion of grading as in giving more reality to existing grades. Frequently provision was made in the price schedules for as many as four grades of milk with no sharp differentiation between the grades, but a considerable differential in the selling price, very little of which was passed back to the farmers. "It has been our contention," wrote Jensen and Ford, "that there should be very few grades of milk, possibly three, including certified milk, and that there should be sharp differentiation between grades, not only as to butterfat content but as to bacterial count as well. Furthermore, each grade of milk should be specifically labeled as to fat content and bacterial count on the bottle cap . . . In the case of cream it is essential that the butterfat content be specified to distinguish between the various grades."

Another important aspect of these agreements was the type of control committee set up to administer them. In most cases, however, this administrative arrangement was left to the producer cooperative associations and the organized distributors to work out, and usually they agreed to continue existing arrangements worked out in private bargaining. These arrangements were frequently unsatisfactory to minority interests, particularly to groups of distributors or individual distributors not represented in the bargaining organizations, and also to individual producers not affiliated with the producer cooperatives. The Consumers Counsel Office pressed for adequate Administration representation on the control committees, and whenever possible for representation of the consumer interest. They tried to arouse consumer groups to an interest in local hearings on provisions of the marketing agreements, and in the subsequent administration of agreements.

There was, however, a real difficulty in stimulating local interest, as F. F. Lininger in his *Dairy Products Under the Agricultural Adjustment Act* pointed out with reference to the Boston milk agreement: "Here as elsewhere by this time the

demand was insistent that the 'consumers' or the 'public' be represented in the local administering agency, but no one had any clear notion as to how this interest could participate in the drafting of a marketing agreement or in its administration. Obviously without organization it could not sign an agreement and thus become a contracting party. Nevertheless it was conceded that the consuming group has as valid an interest in the price and other phases of the agreements as had any other group."¹⁵

The subsequent story of the Chicago milk agreement is illustrative of the problems encountered in enforcing the milk agreements, and the supporting blanket licenses. The price schedule fixed in the Chicago agreement as of August 1, 1933 was based on a producer price of \$1.75 per 100 pounds of milk of 3.5 percent butterfat content (the existing rate) and a retail price of 10 cents a quart, though at the time some of the stores were selling milk for 6½ cents, and some peddlers' stands at 7 or 8 cents. The producers complained that their price was not high enough and in early November it was raised to \$2.10 which was parity price in the Chicago area. At the same time the retail price was increased to 11 cents. The result was an increase in the bootlegging of milk from the large surplus producing area around the Chicago milk shed, and particularly in "chiselling" by independent distributors on the fixed retail price, and by cash and carry dealers.

There was an immediate demand from the producer bargaining cooperatives and the organized distributors that the Administration should proceed against the "chisellers" and effectively enforce the license. But since most of these violations were of the fixed retail price, the Administration had to face the question "whether governmental powers should be used to compel some dealers to charge a higher price than they are willing to charge, while maintaining the established fair price to farmers." The situation put a distorted emphasis on retail price-fixing in a program designed for the protection of the

¹⁵ Brookings Institution pamphlet, 1934, p. 41.

farmers, and as pointed out above, it was not at all clear that such price-fixing was necessary to effectuate the declared policy of the Agricultural Adjustment Act. Moreover the "chisellers" had the support of the Chicago public, and of a significant group within the Administration itself including both the Consumers Counsel and the General Counsel. The Department of Justice was very unwilling to proceed by injunction in such circumstances. Hearings were therefore called in Chicago at the end of November 1933 for a reconsideration of all the issues involved. Howe had vigorously urged the desirability of holding public hearings in areas affected, to give an opportunity for the expression of local opinion other than that of corporation officials and lobbyists which frequently dominated "performances" in Washington.

Howe attended the Chicago hearings with his assistants, and played quite a dramatic part, appealing, on the one hand, for more milk for the low-income families, and on the other hand trying to prove that the distributive margins fixed by the price-schedule were exorbitant, and should not be protected by agreements which were exempted from the anti-trust laws. He even suggested that a municipal yardstick for milk distribution might be desirable, thus adding fuel to the fire of Peek's temper.

These hearings convinced the Secretary that the milk marketing program had to be fundamentally revised. Following Peek's removal in December, the Administration worked out a new policy, which Secretary Wallace announced in an address delivered at the Farm and Home Week, Wisconsin College of Agriculture, January 21, 1934, on "The Dairy Dilemma." This very frank statement of the Secretary, which constitutes an interesting historical document, aroused much opposition among organized distributors and some officials of the producer cooperatives.

Referring to the preliminary discussions that led up to the formulation of the milk agreements, the Secretary said:

To put the matter bluntly, we wanted to know whether, in order to give the farmers what they needed, we also had to give the distributors everything they wanted. We asked whether failure to give the distributors what they wanted would mean that we could not give the farmers what they needed. And if the answer to that was "Yes", we wanted to be assured that what the distributors were asking was reasonable and enforceable. . . . Specifically we did not want to set up a complete schedule of prices in any milkshed, involving retail prices as well as farm prices, until we knew whether existing prices charged by the distributors were reasonable. We could discover that only by access to the books. Yet we were urged by some of the most influential co-op leaders to set up the complete price schedule first, slap on a license, and examine the books later and at leisure. They seemed quite willing to risk the possibility of prices too high to the consumer, of excessive profits to the distributors, in short, of an agreement that might prove to be unsound economically and therefore unenforceable. They were not only willing to risk it; they were insistent that we do so. . . . We were almost compelled to conclude that perhaps the distributors had the situation so well in hand that they had us all by the throat, and that our only alternative to inaction was to go into some of these agreements blindly for the time being. . . . The attitude of the milkshed representatives was, "For God's sake do something, and do it quick."

The Secretary proceeded to point out that under the terms of the milk marketing agreements, Administration officials did look into the books of the distributors after the agreements were put into operation.

I have the composite figures on distributors' profits in St. Louis, Chicago, Boston and Philadelphia, for the five years ending December 31, 1933. These figures are for distributors handling from two-thirds to 80 percent of the milk in these cities. As the Government auditors—not the distributors', of course—figure, the distributors in these four cities took profits during the five years as follows: St. Louis distributors averaged 14.6 percent net profit; Boston, 22.5 percent; Chicago, 25.8 percent; Philadelphia, 30.8 percent. In 1933 our auditors' estimates indicate that St. Louis distributors averaged 7.3 percent net profit; Chicago, 10.9 percent;

Boston, 16.3 percent; and Philadelphia, 21.7 percent. Those figures speak for themselves. They explain one reason for our new policy on milk marketing agreements.

He went on: "So far as milk marketing agreements are concerned, what I have been trying to say can be summed up in our experience with the Chicago milkshed . . . It set prices higher than could be maintained with consumer purchasing at its present level. The competition of new producers, the so-called chiseling of small distributors, was bound to come. The agreement created a hostile public opinion. It could not be enforced, and when we were convinced of that, we said so. I am convinced that was the right thing for us to do."

The new policy decided upon by the Secretary was, in brief, to fix producer prices at a level as high as was considered enforceable in view of the general economic conditions in the industry, and as a rule to leave retail prices uncontrolled, to be fixed by competition. Provision was to be made for equalizing the share of each producer in the fluid market, and for controlling market practices and charges that were generally recognized as unfair. It was decided to operate through the licensing provision alone in view of the difficulty of securing the cooperation of a number of the distributors in working out this change of policy. Administration of the license was to be in the hands of a market administrator appointed by the Secretary, with the help of an advisory board. Action was further delayed by a strike in the Chicago market called by the Pure Milk Association early in January, but by the beginning of February new licenses embodying the changed policy were issued for all markets previously covered by agreements.

This, however, was only part of the proposed new general dairy program. The Secretary was convinced of the necessity of a program of controlled production throughout the dairy industry in cooperation with butter and cheese, as well as fluid milk, producers. Such a general dairy program would include the interests of the 70% of dairy farmers who do not enter the fluid milk markets, as well as the 30% who do.

As pointed out earlier, the Consumers Counsel was not given an opportunity formally to express a point of view on this proposed production control program, though he was known to be opposed to it and to favor an attempt to provide for some more effective system of distribution that would make increased consumption possible. Nothing came of the production control plan, however, largely because of opposition from some of the farm leaders themselves, particularly in the East.

But the milk licenses continued in operation, and were gradually extended, until at the peak, in December 1934-February 1935, fifty fluid milk licenses were in effect and two additional milk product agreements. The program, however, was subject to frequent litigation, due largely to the fact that the distributors were no longer cooperating voluntarily with the Administration. In some states efforts were now made by the distributors to have State milk control boards set up, empowered to fix retail prices, and some of these efforts were successful, particularly where the cooperative bargaining officials were willing to work along with the distributive groups.

Some leaders of the producer cooperatives and the milk companies showed a bitter hostility towards the Consumers Counsel and the General Counsel of the A.A.A. for the part they played in wrecking the federal farm-retail price programs, and continuing pressure was brought on the Administration to "purge" itself of these unwanted elements. An advance warning of this cumulative hostility was given by the recall, late in 1934, of Einar Jensen, formerly of the Consumers Counsel staff, who had been appointed Market Administrator in Boston. Jensen shared Howe's belief that individual farmers themselves, if they could be contacted, would agree to a mutual interest between themselves and consumers in the quantity of milk sold and consumed. However, some of the officials of the producer cooperatives, as well as the distributors, still hankered after guaranteed margins with fixed retail prices and brought pressure on the Market Administrator to modify the policy laid down by the Secretary the previous January. Jensen's deter-

mination to enforce that policy largely explains the pressure exerted, successfully, to secure his recall. These organized dairy interests, and particularly their lobbies in Washington, were an important factor in bringing about the "purge" of February 1935.

Marketing Agreements for Fruits and Vegetables

There were, however, other factors involved in the "purge," some of which arose out of the second large group of agreements covering fruits and vegetables, particularly those from specialized producing areas, California, the Pacific Northwest, and the Southeast. The return to growers from these products is always very uncertain. They are highly seasonal and subject to the vagaries of the weather; they have to be shipped long distances to markets, frequently under refrigeration, and so fixed costs are high; they are more or less perishable so that if consumer demand is inconstant part of the marketed supply is likely to be a total loss. Efforts have been made over a period of years to effect a more "orderly marketing" of these products to prevent the periodic gluts that break the market price, and in some producing areas, particularly in California, highly organized producer cooperatives have been set up to regulate the supply going on the market either by direct control of shipments, or by agreement with shippers. But as in the case of milk, there have always been independents among the growers and shippers to upset such plans and the producer cooperatives welcomed the opportunity provided by the marketing agreement and licensing sections of the A.A.A. to bring all specialized fruits and vegetables under effective control.

As Dr. Edwin Nourse has pointed out,¹⁶ the situation with fruits and vegetables was different in many ways from the situation in fluid milk. With the latter, the problem was to organize the flow of milk from a number of widely scattered sources of supply into the one marketing area, day after day, throughout the year with a relatively constant demand. With

¹⁶ See E. G. Nourse, *Marketing Agreements under the A.A.A.*, 1935, p. 361.

fruits and vegetables the problem was rather to organize shipments from a specialized area to widely scattered markets in seasonal periods with an inconstant demand.

Large numbers of agreements were proposed and went through the preliminary conference stages; but by the end of 1934 only about thirty agreements covering individual products or in some cases groups of products from special areas, had been approved. These included dried fruits and nuts, canning peaches and olives, and there was a separate license without agreement for canning asparagus. The agreements were made as a general rule by the Secretary with cooperating shippers and canners, and only in a few instances were associations of producers direct parties to them. All members of the industry affected were brought under control by a blanket license.

The technique of control chiefly relied on to raise the farm prices of these commodities to parity level, was the regulation of the market supply. This meant the more effective routing of supplies to the various markets, but more particularly the withholding of supplies during certain periods in order to maintain prices. In general a system of proration was adopted for the limitation of supply. When the control committee agreed that the available supply was in excess of the supply that could be marketed at a satisfactory price during a given period of time, they decided on the total quantity that should be shipped during the period, usually on a grade basis, and prorated it among the shippers according to some agreed formula, or, in one or two instances, allocated it among the growers themselves by means of certificates showing the total amount each grower was permitted to sell. The proration period might be limited to part of the season or might cover the total annual production. The agreements were limited to special growing areas but in the case of citrus fruit, provision was made in the agreements covering California, Texas and Florida for the setting up of a national stabilization committee empowered to prorate the total annual production in the United States; this plan, however, was never put into effect. In its very difficult

task of working out the statistical bases for its determinations, the control committee set up under each agreement usually had the help of technical committees, a proration committee, a sales committee and so on. In some instances where a proration scheme could not be worked out, simpler and more direct methods of control were used. For example, in the south-eastern watermelon agreement, the control committee was empowered to prohibit the shipment of watermelons below certain specified grades and sizes, or to prohibit all shipments for two-day "holiday" periods, in order to maintain prices.

The Consumers Counsel Office under Howe felt that more attention should be given to the possibility of increasing returns to farmers through increased efficiency in production and distribution. They seem, however, to have accepted in principle a program for the control of market supply, providing there was "an impressive weight of testimony to demonstrate its necessity." But they drew attention to the great technical difficulties involved in securing adequate information on demand and supply, and in making an equitable proration to individual shippers and growers. The most important question from the consumer point of view was the actual quantity of any fruit or vegetable that was permitted to come on the market, and this was left to the determination of the control committee in which the Consumers Counsel had no voice. Since it could not secure direct representation on the control committees, nor representation for local consumer groups, the Consumers Counsel Office made every effort to secure an effective control by the Administration over a committee's decisions. However, since these decisions had at times to be made and put into effect at great speed—for example in limiting supplies of strawberries coming on the markets over a cold week-end—such Administration control was at times hardly more than nominal. It was argued by shippers that since in most cases growers are anxious to get as much as possible of their crop on the markets, and handlers on commission are also interested in volume, the possibility of an artificial short supply was not

very great, except perhaps in some of the processed crops where growers supplies are bought up by the processors, or with less perishable products like nuts where adequate provision can be made for handling the surplus.

One question relating to the technique of control was the effect on the consumer of limiting supply by withholding low and off-grade products from the market. These are the products which sell cheaply and are available to low-income groups. Did the withholding of these grades from the market unduly limit the consumer's range of selection and confine it to higher priced varieties? For example, in the proposed 1934 amendment to the walnut agreement, the walnut control committee was, in effect, given power to prohibit the sale of "orchard-run" nuts. The Consumers Counsel agreed that these nuts should be made subject to the controls set up, and that they should be required to be graded for size and culled for unsound nuts, but not that they should be forced through the packing houses to be bleached and packed. They declared there was no evidence to show that the sale of "orchard-runs" had been detrimental to consumers. Lots of "orchard-runs" might contain a relatively larger proportion of deteriorated or unsound nuts than lots of processed nuts, and they might not be of such uniform and slightly appearance; but on the other hand they were considerably cheaper than processed nuts, and there was no good reason why consumers should be cut off from the supply of unprocessed walnuts sold by growers, roadside stands, or retail grocery stores.

Perhaps more attention was given by the Consumers Counsel Office to proposals for eliminating low-cost methods of distribution. This question was raised, for instance, in connection with bulk shipments of citrus fruits. The representative of the Consumers Counsel Office who followed the Florida citrus agreement wrote in his report:

Evidence to the effect that absolute prohibition of bulk shipments is necessary to insure adequate control over the supply was presented at the hearing. In my opinion, however, such evidence

was unconvincing. There is reason to believe that growers' and packers' financial interests in packing house activities are an important factor in the demand that all fruit be forced through packing houses. . . . Bulk fruit usually does not go through packing houses and, of course, no closed containers are used. It is therefore handled at less expense than packed fruits. Either the grower or the consumer must, under competitive conditions, get the greater part of this saving. Furthermore the grower is likely to demand and receive cash at the grove for most of this bulk fruit, especially that which is hauled by truck. If bulk fruit shipments are not as honestly handled as packed fruit shipments, such dishonesty should be eliminated by proper police regulation rather than by destroying this method of distribution with its obvious economies. . . . I believe that proper organization of the citrus industry could lead to development of adequate means for maintaining quality standards of fruits shipped in bulk. I see, then, no good reason why the individual housekeeper or the restaurant should not be privileged to purchase citrus fruit just as it comes from the tree, and doing as much or as little washing and polishing of the skin as may be desired before peeling the orange or extracting the juice.

Another problem which disturbed the Consumers Counsel Office under Howe was what could be done with the surplus eliminated from the regular marketing channels. Most agreements provided that the surplus thus eliminated could be diverted to export or into by-products, or could be distributed for charitable or unemployment relief purposes. In the case of semi-perishables, particularly dried fruits and nuts, the control of the surplus became an important part of the marketing program. With highly perishable products, however, much of the surplus not suitable for by-products could only go to waste. The Consumers Counsel Office was particularly anxious to salvage as much as possible of the surplus of perishables and was largely responsible for the provision in agreements that permitted its diversion for charitable and relief purposes. Not much use of this provision was made, however, until after the 1935 amendments to the Agricultural Adjustment Act, though conferences were held between representatives of the

Consumers Counsel staff and F.E.R.A., and a beginning was made in relief distribution.

In general the Consumers Counsel Office was disturbed that so much attention was being given to marketing control as an effective instrument of price-raising, and very little attention to increasing consumption or even improving and thereby lowering the cost of the distributive process. Dr. Carl Schmidt, economist of the Consumers Counsel staff, wrote in a memorandum of November 2, 1934: "It is apparent that the main purpose of all these agreements is to institute some method for controlling production or shipments in order to extract larger incomes from consumers. Now, an emphasis on supply control may be justified as necessary in order to bring immediate relief to growers. But this emphasis should not make for an utter neglect of the possibilities for developing provisions for raising the efficiency of production and distribution processes. However, the agreements have contributed very little, if anything in the direction of further efficiency."

In controlling market-supply, the objective was to raise prices, and, in determining the quantities to be put on the market, the control committees had a definite price-level in mind. For the most part, however, there was no direct price-fixing in the fruit and vegetable agreements, with some conspicuous exceptions. The Adjustment Administration itself was inclined to oppose price-fixing for perishables as being unenforceable, for once perishable products have got into the channels of trade they are usually disposed of, regardless of price. But in a few instances provision was made for fixed prices to growers, with or without fixed resale prices. Except in the case of Northwest deciduous fruits, the products affected by these price-fixing provisions were semi-perishable or canned.

The Consumers Counsel Office does not seem to have taken any consistent attitude with regard to price-fixing in the few fruit and vegetable agreements where provision was made for it, partly because of peculiar circumstances in the industries

affected. They did, however, point out that in cases where minimum prices to growers were fixed without provision for production control, there was a danger that production would be increased so much that the agreement would prove unenforceable.

One provision advocated by the Consumers Counsel Office for inclusion in some of the fruit and vegetable agreements, related to the use of grade labels for the information of the consumer. The nature of the opposition encountered by the Consumers Counsel Office in its attempt to promote grade labelling under the General Canners Code has been described above. This opposition by the canners to the use of grades, it should be noted in passing, did not apply when grades were the instrument of an "orderly marketing" program—for instance, under the canning peach agreement, canners could be prohibited from taking peaches that did not meet U. S. grade A requirements. But apart from the attitude of the canning industry, the main problem that confronted the Consumers Counsel Office related to the technical difficulties involved in the preparation and use of consumer grades for fresh fruits and vegetables. Some of these difficulties were discussed by representatives of the Consumers Counsel Office in their reports on the citrus agreements. The report on the Florida agreement discusses specifically the difficulty presented by different methods for carrying grades through to the consumer particularly with reference to bulk shipments. As a result the fruit and vegetable agreements did not do much to further the use of consumer grades, though commercial grades were generally adopted for supply-control operations.

With reference to the fair trade practice provisions in the agreements and accompanying licenses, the Consumers Counsel Office under Howe was specially concerned with their effect on the distributive spread, and on existing competitive forces. Representatives of the Office warned against the possibility of monopolistic developments in view of the exemption from provisions of the anti-trust laws, unless adequate government

control was assured, and they were of opinion that the A.A.A. had not established effective supervision over the operation of the agreements and licenses. It was in this connection that they continued to urge the necessity for the A.A.A. to secure for itself the right of access to all books and records of the businesses affected, and their subsidiaries. Provision was made for access to records in the milk agreements, and in general there was no opposition to it from businesses engaged in the distribution of perishables, but it continued to be a source of controversy with some of the processing trades, and was the immediate occasion, though not the sole cause of the February 1935 "purge."

In 1934 the asparagus canners had refused to sign an agreement including a books and records clause, but they had been willing to operate under a license imposed by the A.A.A., since in that case they believed they were protecting any rights they might have if they chose to take the issue to the courts. By the beginning of 1935, however, it seemed desirable to the industry to conclude a marketing agreement, and Chester Davis, the Administrator who succeeded Peek, was anxious to complete this agreement before the growing season began. The method for control adopted in this industry was a limitation fixed by the control committee on the total pack, by declaring an opening and, later, a closing date for the canning season. By this means, canners were expected to receive increased returns and as a result be better able to pay more to growers.

The Consumers Counsel Office, however, were of opinion that the canners were getting a monopoly advantage out of this control situation and they insisted on a "books and records" clause in the agreement. Jerome Frank, the General Counsel of the A.A.A., refused to certify the agreement for approval without such a clause. The canners refused to accept the agreement on these terms and the Administrator, with the growing season hard upon him, was prepared to support the canners. A "split docket" therefore went up to the Secretary, who returned it for further consideration. The Administrator

was very angry. He was endeavoring to get through all proposed agreements which seemed to him to offer benefits to the farmer, and he did not want such agreements to fail "because of doctrinaire insistence that certain ideal requirements be met." On this particular issue, the Californian growers were strongly behind him.

As pointed out above, Davis had for some time been subjected directly and indirectly to great pressure, political and otherwise, from representatives of the food industries and particularly from the fluid milk interests, including the producer cooperatives, to get rid of the "bunch of propagandists" in the Offices of the General Counsel and the Consumers Counsel. The strain had now reached the breaking point and he was not willing to carry on under the circumstances. It was February 10. All streams of opposition now converged and without further delay swept away Frank and Howe and some of their assistants. Their dismissal required no formalities. Howe was replaced as Consumers Counsel but was kept for a short time on the payroll of the Consumers Counsel Office and then given a roving commission by Secretary Wallace.

"The purge," declared Raymond Gram Swing in an article in *The Nation*, February 20, 1935,¹⁷ "is the defeat of the social outlook in agriculture." And there was considerable comment to the same effect, especially in liberal circles, with the implication that even the Secretary had at last come under the control of the processors, that he too was now a "processors' man."

The fact was of course that the Secretary and Administrator Davis were farmers' men. They considered it their responsibility to protect farm interests and to advance them as much as possible. They thought of farmers as farmers thought of themselves, chiefly in their capacity as producers. Howe always contended that the interests of farmers and consumers are mutual, and the Secretary himself supported this point of view

on different occasions, as for instance in his Wisconsin address on "The Dairy Dilemma." But the Secretary was not willing, when the issue was squarely put to him, to spend the energies of his administration in fighting for reform in distributive practices and against monopolistic tendencies in the food industries, as part of the immediate agricultural program to relieve an acute distress among groups of farmers. It is of course questionable whether he had the power to do so, and whether the gains to consumers, if any, would have justified the enormous battle that would have been precipitated.

That the Secretary had not been "bought over" by the processors was clear from the Congressional hearings on proposed amendments to the Agricultural Adjustment Act (H. R. 5585) at the end of February, a few weeks after the purge. These amendments were asked for by the Secretary with the full support of the National Agricultural Conference (including the National Grange, the Farm Bureau Federation, the National Council of Cooperative Associations and other farm groups). They aimed, *inter alia*, to clarify the licensing powers granted under the act and to extend them by enabling the Secretary to license members of a food trade without the consent of a majority of the trade, and also by giving him explicit statutory authority to examine books and records when exemption was granted from the anti-trust laws. By these amendments, said Sydney Anderson, representing the Millers' National Federation at the Congressional hearings, notice was served "upon all manufacturers and distributors that their business must be run under rules and according to the ideas of the Secretary of Agriculture in the interest of agricultural producers." Mr. Putnam, representative of Swift and Company, warned: "We might have a ruling from the Secretary of Agriculture that these processors who are licensed can have no advertised brands that are popular in the minds of the consumer, that they cannot go on with them; that the processor will not be allowed to whet the appetite of the public for certain kinds of meat . . . The meat packing industry more

than any other I know of needs freedom to make contracts, to engage in enterprises, and to compete." An Agricultural Industries Conference representing the food trades concerned was organized to fight the amendments, and succeeded in having them dropped.¹⁸

CALVIN HOOVER'S REGIME

Calvin Hoover was selected from the Secretary's group of personal advisers to head up the Consumers Counsel Office after Howe's removal. He was more of a technically trained economist than Howe, with less of the spirit of a crusading reformer. As an adviser on the Secretary's staff he had been in close touch with the developing agricultural program. His personality and his experience were no doubt contributing factors in the continuance, under the circumstances of the time, of the Consumers Counsel Office, which Howe had so zealously built up.

There followed a period of uncertainty during which an attempt was made to answer the question: "What is the function of an official on the staff of the Agricultural Adjustment Administration, appointed to represent the consumer interest?"

At this time, the Consumers Counsel Office had an active staff of 11 economists in the marketing agreement division, with about 15 members in the statistical and research unit, in addition to those working on the *Consumers Guide* and in the service unit. To what end should the work of such an office be directed?

On April 25, 1935 Administrator Davis issued a public statement on the functions of the Consumers Counsel, in the form of a letter to the County Consumer Councils:

18 In the following August the books and records clause was passed but only because at the same time the licensing power was dropped and less "drastic" orders substituted, and, in addition, several industries succeeded in having themselves exempted even from the issuance of orders.

As I see it, under the Agricultural Adjustment Administration the office of the Consumers' Counsel has a two-fold responsibility.

It has a responsibility to the Administration here in Washington, and it has a responsibility to the general public as consumers of farm products.

Its function, so far as the Agricultural Adjustment Administration is concerned, is to represent the interest of the consumer at every stage in the Administration's activities. When a commodity control program, a marketing agreement, or a licensing agreement is under consideration, it is essential that both producers' and consumers' interests be represented by trained economists, highly skilled in research and in the interpretation of economics. In many cases, there is no conflict of interests: the consumer wants the producer to receive the kind of returns for his produce that will insure the continuance of an adequate food supply, and the farmer wants the consumer to be able to buy an adequate volume of farm products. In some cases, where there is some apparent conflict, on particular points, it is the function of the Consumers' Counsel to represent the consumer and assist in finding the point of maximum justice to both producer and consumer.

Once a program, a marketing agreement, or a license is in effect, it is the function of the Consumers' Counsel to observe its operation, and determine whether or not the results anticipated at the time it was framed are actually being obtained. Should it appear that they are not, the Counsel has a double duty, a duty to urge reconsideration of the program with the AAA to see if the fault needs to be remedied by a change in the provisions of the program, and a duty to give publicity to the facts as they exist.

The giving of publicity is particularly important in the cases where the proper amount of the price paid by the consumer is not being passed on to the farmer, but is being unjustifiably retained as a margin by the middleman. Effective work on making public undue spreads between prices paid by consumers and prices received by farmers has already been done by the Counsel in a number of instances.

The Consumers' Guide, issued by the office of the Counsel and sent free on application, is the vehicle through which pertinent information regarding price movements and living costs is transmitted to individuals and groups concerned with the consumer's interest.

As outlined in this statement by the Administrator, the "internal" activities of the Consumers Counsel were to be broader based than previously. He was to participate in the general production control program as well as in the formulation of marketing agreements and licenses. In case of conflict he was to "assist in finding the point of maximum justice to both producer and consumer." There was no longer any illusion, however, as to the limits of his advisory function. He could advise, or even attempt to persuade, but it was clear that in the future an adverse report from him would not be effective in holding up a program.

In practice, also, his participation in the general program came to be limited by procedure. On Hoover's appointment, the Consumers Counsel Office had been made a division in the Administration, and, as a division head, he took part in the meetings of the reconstituted agricultural council (an informal cabinet within the A.A.A.), but again this was short-lived. As late as September 3, 1935, after the August amendments had made provision for public hearings on control programs, Hoover found it necessary to bring up the question of procedure in a memorandum to Administrator Davis. In this he agreed that the best time for suggestions and criticisms was at the pre-hearing conferences to avoid the embarrassment of public controversy between officials of the A.A.A. But under existing procedure it was impossible for him to function effectively since he was not brought actively into the preliminary program discussions, and he asked that recommendations from his office be included in the departmental docket prepared at all stages of the formulation of a program.

In so far as he had opportunity to present a consumer point of view within the A.A.A. on the production control programs, Hoover ¹⁹ "constantly strove to get accepted the principle that there must be no measures taken which would reduce the quantity of food products raised below an amount large enough to provide for per capita consumption as of 1925-29, plus

¹⁹ Correspondence dated March 10, 1938.

probable exports. For example, I insisted that the goal with respect to pork must be to provide enough hogs so that everybody could have as much pork as they had in the period mentioned after allowance for increase in population and probable exports. I watched all programs for reduction, all marketing agreements etc. with this purpose in view. I did get the principle formally accepted, although to see that it was actually carried out was a more difficult matter." The question of pork supplies was a difficult one, as the livestock section in the A.A.A. argued that if the supply of hogs were to equal per capita requirements in the twenties, hog prices would decline to a point far below parity so long as consumer incomes remained below the 1929 level.

Hoover gave considerable attention to the general problem of what should be considered "an adequate supply" from the consumer point of view. This problem had been before the A.A.A. from its early days,²⁰ but did not become urgent until after the 1934 drought. Just what does it mean, Hoover asked, to plan for adequate domestic consumption? Increased consumer income, more equitable distribution of wealth, improvements of dietary habits are objectives towards which all available national intelligence and energy should be turned, but in the meantime we must find some other measure of adequate consumption. His suggestion was to take the per capita average for 1925-29 with allowance made for market trends. It was as an aid to securing adequate supply that he supported the Secretary's program for an "ever-normal granary." In an address in Boston, May 27, 1935, he said: "Since it is impossible on account of variations in crop yields to know exactly how many acres will produce a given harvest, it is extremely desirable to supplement production control with what Secretary Wallace calls an "Ever-Normal Granary" which would insure consumers adequate reserves against a drought such as that of 1934, and insure farmers against low prices resulting from unsalable surpluses."

²⁰ See H. R. Tolley's statement, January 31, 1934.

In connection with the marketing agreements and licenses, Hoover "always combatted vigorously the idea, which some held, that any price which the farmers could get the distributors to agree to, as in the case of milk for example, was all-right."²¹ He raised the question "Is it sound national policy to allow producers to set prices at the point which will simply yield them the highest net returns? Even if this is sound policy for pricing agricultural commodities as a whole on account of the relatively inflexible demand, is it sound policy in respect to each individual commodity?" He also opposed, as the Consumers Counsel had always opposed, official approval of provisions in agreements and licenses which resulted in an increased distributive spread. In the Boston milk market for example there was an almost constant tendency for the margin to expand during the period of federal regulation. "It used to be rather the custom," Mr. Hoover writes,²² "for the farmers' cooperative leaders to make a deal with the distributors by which the price of milk to the farmer would be raised approximately one half cent while the price to the consumer per quart would be raised one cent. Then they expected to be able to use the powers of government to compel everybody to live up to this arrangement." It appears that this technique for increasing distributive margins was developed after the failure of attempts to secure guaranteed margins (by fixed retail prices.). A statement of the Consumers Counsel position on this question was made in the *Consumers Guide*, July 22, 1935.

In his statement of April 25, relating to the functions of the Consumers Counsel, Administrator Davis had given the Consumers Counsel a two-fold responsibility, one to the A.A.A. itself, and the other to the general public as consumers of farm products. With reference to the latter function, Davis said that the Consumers Counsel had a duty to give publicity to the facts as they existed when the program in operation was not

²¹ Correspondence, March 10, 1938.

²² *Idem*.

giving the results anticipated, particularly in cases of profiteering by middlemen.

It was tacitly agreed by Hoover that the weekly press conferences instituted by Howe should cease, and that publicity should be limited to the publication of the *Consumers Guide*, the weekly radio programs, and such published articles as could be subjected to censorship. But there still remained the unsettled basic issue: Under what circumstances, if any, could the Consumers Counsel bring a question of policy adversely affecting the consumer interest into public controversy, or even to the attention of the consumers whose interests he was supposed to represent? What in short was his real responsibility as a consumer representative? Was he merely to act as a public relations man for the A.A.A. to sell consumers on the agricultural program, once it had been decided upon?

In a memorandum to Administrator Davis, dated July 5, 1935, Hoover wrote: "It is obvious that the external functions of the Consumers Counsel might be eliminated and it is quite possible they should be. I am quite aware of the embarrassment to the Administration in dealing with farmers of having an official with any direct responsibility to consumers in the A.A.A. If the external responsibility and functions of the Consumers Counsel were eliminated, the remaining functions formerly exercised by him might be carried out by an economic adviser, who should be specially designated but not specially titled. In such an event I would also recommend that the *Consumers Guide* and all radio speeches and magazine and press articles which purported to express a special consumer point of view be dispensed with. Frankness with the public would seem to require this and I would be willing to take the public responsibility for so recommending."

The external functions of the Consumers Counsel Office were not formally set aside, but the publicity issue was never clearly decided in terms of responsibility to the consuming public. Hoover raised it again in connection with the developments in the Boston milk market under a federal license which

he considered detrimental to the consumer interest.²³ He recognized the anomaly of his position but insisted that to protect his personal integrity as well as his official integrity as Consumers Counsel, he must be permitted to make a general public statement on the issues involved in the Boston situation as he saw them. Otherwise he would resign. The statement was issued in the *Consumers Guide*, July 22, 1935. The fact that Hoover interpreted his function as that of an adviser stating a point of view rather than an advocate fighting for a cause made this episode the more indicative of a fundamental difficulty in the Consumers Counsel position.

Hoover returned to Duke University in the fall of 1935. Mr. D. E. Montgomery, his assistant, became Consumers Counsel.

MONTGOMERY'S REGIME

It is convenient to consider this period under the two main functions of the Consumers Counsel as outlined in the Davis memorandum: (1) the advisory function within the Administration and (2) contacts with consumers and organized consumer groups. These functions became increasingly distinct.

The "Internal" Advisory Function

During the Montgomery regime the "internal" advisory function has been exercised at least nominally in relation both to the general production control program and the marketing agreements.

The August 1935 amendments to the Agricultural Adjustment Act required public hearings before the adoption of a production control program. This meant that the Consumers Counsel would have the opportunity to make a public statement as to the consumer interest in that program. Two hearings were held in Washington, D. C. under the provisions of this amendment, one on the proposed corn and hog program, September 26, 1935, and the other on the potato program, October 3, 1935. But the following January the production control pro-

²³ See p. 247.

visions of the Agricultural Adjustment Act were invalidated by the *Hoosac Mills* Decision of the Supreme Court. The substitute Conservation and Domestic Allotment Act, though it had the same general objectives, had a long-time rather than a short-time significance. Under it the procedure of planning and decision-making had to be changed: programs and administration became more decentralized and the technique of public hearings was dropped in favor of a larger development of county committees of farmers on which no consumer representatives, official or unofficial, have so far been invited to sit. No effective procedure for regular participation by the Consumers Counsel in administration planning and program-making under these changed conditions was worked out.

The second Agricultural Adjustment Act, 1938, considerably diminished the area of administrative discretion in formulating a production control program. Elaborate statistical formulae were included in the act as guides to administrative action. This may account for the fact that no provision was made for public hearings. But in so far as discretion is exercised in the control program, it seems desirable, in the consumer interest, that provision should be made for public hearings, both in Washington and in the field. Otherwise the Consumers Counsel has no opportunity to make a public statement on what he considers the consumer interest in a control program, since his position as a member of the Administration staff prevents him from giving publicity to issues raised in "internal" discussions. Under such circumstances consumers are left without a lead on technical subjects which are not easy for them to analyze and understand. This is a serious problem to which consumers should give attention.

In view of the circumstances outlined above, a special importance is attached to the statements made by the Consumers Counsel at the corn and hog hearings and the potato hearings late in 1935.

The situation in corn and hogs was that, whereas in 1920-29 there was an estimated per capita domestic consumption of

about 83 pounds of hog products annually, the estimated supplies available for the marketing year beginning November 1, 1935 would be only about 47 pounds per capita, due not so much to production control as to the drought. The A.A.A. was prepared for a program stimulating an increase in production providing that this did not lead to any considerable fall in price.

At the corn and hog hearings, Montgomery declared: "The primary interest of consumers is that this shortage in the supply of pork and lard be remedied as rapidly as possible. . . . If there is to be a corn-hog adjustment program it should, in the interest of the consumer, permit the supply of hog products for domestic consumption to increase as rapidly as is consistent with the purposes of the act. In the year 1935-6 it should permit hog production to increase at least as rapidly as it would increase if there were no adjustment program, and it should call for a further increase in that year if inducements for greater production can be provided for in the program."²⁴

At the potato hearings, Montgomery expressed the opinion that consumers would not be injured by stabilization of potato production at the normal level of potato consumption.

The wide variations that occur in potato production are not matched by corresponding variations in consumption, for the consumption of potatoes is already more stable than their production. The low prices you get when you produce too much do not have the effect of making consumers eat the entire amount. Low prices in years of excess production not only reflect the supply that enters into consumption but reflect also the surplus potatoes for which there is no market. . . . Consumers cannot legitimately demand that producers continue to allow their production to fluctuate widely above and below the quantity that normally is required for consumption. Indeed they may well find a common interest with producers in eliminating such fluctuations. Years of less than average production are as much a part of the potato cycle as are the years of excess production. Years of short supply work an injury to consumers that is not made up to them

²⁴ See *Consumer's Guide*, Oct. 14, 1935, p. 9.

by intervening years of overproduction. When the supply is low the consumer cannot satisfy his desire for more potatoes by his recollection of how many he had last year and how cheap they were. This opinion that consumers can make common cause with producers in stabilizing the potato supply is stated only upon the assumption that the level at which you stabilize will provide all the potatoes that consumers normally need and use. Consumers will not approve a plan that seeks to make potatoes scarce.²⁵

The Consumers Counsel believes that the position taken by him on potato control contributed to holding the Administration program on a sound basis when it was under extreme pressure.

With reference to the production control program, Montgomery was also interested in the question of quantity criteria, and was partly instrumental in having the Wagner amendment providing for such criteria, included in the 1936 Conservation Act.²⁶

In addition to the control programs for basic commodities, the A.A.A. continued to exercise powers of regulation in the processing and distribution of farm products, though these powers were much reduced by the August 1935 amendments. The licensing power was withdrawn, provision being made for the issuance of orders, violation of the terms of which was subject to fines. An order to an industry might be issued providing a marketing agreement were concluded with handlers of 50% of the volume of that industry, or without such an agreement if it were demanded by a given percentage of the producers of the commodity handled, and had the President's approval. However an order might only be issued in respect to a limited number of specified commodities—milk, fruits and vegetables, except for canning, tobacco and a few specialties. Further, the orders might contain only such provisions as were expressly authorized in the amendments. These provisions did not apply to the marketing agreements as such, but an agree-

²⁵ *Ibid.*, p. 11.

²⁶ See above, p. 198.

ment without a supporting order to all members of an industry was of minor importance in the marketing program.

Under these provisions, there was to be no retail price-fixing in an order for any commodity, and price-filing was to be allowed only for commodities other than milk. Farm prices might be fixed for milk but not for other commodities. In 1937, as pointed out above, the Secretary was empowered in certain circumstances to fix farm prices for milk above the parity level. Price increases for commodities other than milk were to be secured through limitation of market supply and control of the surplus. Certain unfair methods of competition and unfair trade practices might be prohibited. The powers of administrative agencies set up under the orders were now statutorily limited. The question of access to books and records was at last taken out of the arena of administrative controversy, by empowering the Secretary to require information and to examine books and records to ascertain how far an agreement or order had been carried out or had effectuated the declared policy of the act, or whether there had been any abuse of the exemption from the anti-trust laws.

As a result of these amendments, the area of administrative responsibility for the terms and methods of marketing regulation was closely circumscribed. There was of course still some scope for administrative discretion, and the Consumers Counsel continued to participate as formerly in the procedure of making agreements and orders, under the provisions of the amending legislation. At no time has the Consumers Counsel been given responsibility in the carrying out of such orders and agreements.

An interesting development occurred in connection with a new milk marketing agreement for the Boston milk area, which had already figured prominently in the Hoover regime. Montgomery protested the agreement mainly on the grounds that the proposed increase in retail prices would still further decrease fluid milk consumption, already too low, and at the same time continue the trend towards an increase in distributor margins

under government regulation. "I believe," he said, "producer organizations must recognize that only through increased consumption of fluid milk will it be possible to establish satisfactory producer returns on a stable basis." The special interest in the incident lies in the fact that for the first time, the Consumers Counsel criticism was included as part of the news release issued by the Department of Agriculture announcing the signing of the agreement, January 6, 1939. As a result of this incident however, it is understood that it is no longer recognized as a function of the Consumers Counsel to dissent publicly from departmental decisions which he believes adversely affect the consumer interest.

A related area of Administration activity which has some significance for this discussion of the functions of the Consumers Counsel, is the "surplus" diversion program. The question of what to do with the surplus was always one of the main problems under marketing agreements, but it was not until the amending legislation of 1935 made available up to 30% of the tariff revenue for surplus diversion at home and abroad, that the diversion program became an important administrative activity. The A.A.A. has bought up large quantities of agricultural products which are now usually handed over to the Federal Surplus Commodities Corporation, virtually a subsidiary of the A.A.A., for distribution to families on relief—the so-called "underprivileged consumers." But despite the interest of the Consumers Counsel Office, since its establishment, in programs of diversion for relief needs, no administrative provision has been made to enable the present Consumers Counsel to participate directly in the administration of the enlarged diversion program though the Consumers Counsel Office has been called upon to cooperate in research and public information in relation to it. It should be pointed out here, however, that the program has benefited by the advice of the Bureau of Home Economics of the Department of Agriculture.

The general conclusion one reaches after considering the "internal" advisory function of the Consumers Counsel dur-

ing the last few years is that it has been so alternately expanded, modified, and diminished by Congressional action and administrative procedure that there is now urgent need for its restatement. This restatement of function has become particularly urgent as a result of a recent major reorganization of the Department of Agriculture as a whole, including the Agricultural Adjustment Administration, in connection with which much of the program planning activity formerly carried on in the A.A.A. has been transferred to the Bureau of Agricultural Economics. Following this reorganization, the administrative status of the Consumers Counsel Office was for a time very vague, but according to a departmental memorandum of January 19, 1940, the office is to be placed administratively under the general supervision and direction of the Director of Marketing on the Secretary's staff, and not in the A.A.A., an action agency. All questions affecting the Department in the fields of marketing, distribution and regulatory work will be routed through the Director of Marketing, and, presumably, the Consumers Counsel will function in an advisory capacity on all these questions. What the change will actually mean in the work of the Consumers Counsel Office is not yet clear.

The Consumer Relations Function

In contrast with the impression one gets of a rather diminished and uncertain advisory function within the Department of Agriculture, the function of the Consumers Counsel in relation to the consuming public has been greatly expanded. Any adequate estimate of the influence of the Consumers Counsel in the past four or five years has to take into account not only the effect of his consumer policy on Administration programs, but his influence among consumers and on the consumer movement as a whole. And this has been very considerable.

It will be recalled that Howe developed a number of publicity techniques in connection with a drive to check "middleman" profiteering under the A.A.A. and N.R.A. programs. This

anti-profiteering drive was soon taken up by Montgomery. In October 1935 ²⁷ he opened a correspondence with the President of the American Bakers Association following widespread press reports of a rumored general increase in bread prices. The President of the Association replied denying any general agreement among bakers for a price increase and pointed out that "the price of bread is a completely localized matter subject to widely varying factors." Montgomery thereupon decided to prepare a questionnaire to be sent to all bakers in those cities where changes were expected in the price or size or quality of a loaf. The objective of the questionnaire was to get an expression of opinion as to the factors which justify price increases. The Consumers Counsel did not suggest that all price increases were profiteering. Cooperation in this questionnaire was voluntary, and the response was not very satisfactory. In its December 2, 1935 issue, the *Consumers Guide* reported that the anticipated nation-wide upward movement in bread prices had not materialized.

After the invalidation of the production control program and the supporting processing tax, the direct statutory authority for an attack on profiteering through publicity no longer existed. But the Consumers Counsel has continued from time to time to give publicity to threatened increases in retail prices for particular commodities, and releases issued by him in this connection have received considerable attention in the press.

The actual effect of such publicity on price changes is of course not easy to measure, since so many factors are involved in price-making. But it undoubtedly has encouraged organization among consumers, which grows on such attention to their neglected problems. And it is in relation to consumer organization that the regime of the present Consumers Counsel has a distinctive character.

There are different aspects to this consumer-contact function. It has always been understood that the Consumers Counsel should explain the agricultural program to consumers. This

²⁷ See *Consumer's Guide*, December 2, 1935, p. 14.

is important both to the A.A.A. and to consumers. It is only when issues arise on which there is a conflict of opinion between the Consumers Counsel and the Administration that an embarrassing situation arises, brought about by divided loyalties and divided responsibilities. Such embarrassment has no doubt caused the present Consumers Counsel to search some way out of the anomalous phases of his position.

The second aspect of this consumer-contact function is broader and can only be explained with reference to the developing consumer movement throughout the country. The Consumers Counsel has in different ways carried on an educational service to consumers (including farmers as consumers), giving them practical aids in household buying, directing their attention to problems involved in the wise expenditure of income, of quality, honest weight, and so on. More important, however (and more relevant here since we are concerned with the representative function rather than with consumer education as such), is the fact that the Consumers Counsel has been available to assist in the development of consumer organization. It would perhaps not be correct to say that the Consumers Counsel Office under Montgomery has been promotional of consumer organization, as Mrs. Rumsey endeavored to promote it through the County Consumers Councils. But his services have had the effect of stimulating the consumer movement. Further, since the comparison is instructive, in making his services available in this way, he has not been so driven, as Mrs. Rumsey felt herself to be driven, to create a pressure group to support a consumer position taken vis-a-vis the Administration. This is of course partly due to his restricted opportunities within the A.A.A. to present, much less establish, a consumer point of view. This fact has influenced the character of the educational work done by the Consumers Counsel, making it, on the whole, more general and less closely directed to the problems arising in connection with a particular Administration program.

It should be noted, however, that a definite attempt was made to bring unofficial consumer influence to bear on the production control program during the period when public hearings were held on specific products.²⁸ In this attempt the Consumers Counsel had the support of Secretary Wallace. The *Consumers Guide* for October 14, 1935 carried statements made at the corn and hog hearings and the potato hearings by the Secretary and the Consumers Counsel under the caption, "Speak up, Consumer." At the corn and hog hearings there were only three unofficial consumer representatives and none at the potato hearings. "I only regret," said the Secretary, "that outside consumer organizations failed to send representatives to the hearing. I strongly urge that consumer organizations watch for these public hearings and send delegates to argue the consumer's case. It is of the greatest importance that the consuming public take an active part in the democratic mechanism we are trying to develop."²⁹ The Consumers Counsel offered the services of his Office to consumers and consumer organizations wishing to appear at public hearings on the programs, both by notifying them of the time and place of the hearings, and helping them with information on technical questions so that they could participate intelligently.³⁰ This development in the planning program came to an end with the Hoosac Mills decision, but public hearings have continued for marketing agreements, and in these, particularly in the case of milk, consumer participation has been more and more active.

But in fact, the effective appearance of unofficial consumer representatives at hearings held in connection with government regulation of agriculture or industry can be expected only when the consumer interest is more widely organized than it is at present. It can be looked upon as a secondary growth to the consumer movement itself. The influence that Montgomery has had, indirectly rather than directly, in stimulating

²⁸ See above, p. 250.

²⁹ *Consumers Guide*, Oct. 14, 1936, p. 11.

³⁰ See *Consumers Guide*, December 2, 1935, p. 2.

the development of an organized consumer movement, has therefore an immediate bearing on the whole question of consumer representation in the regulatory process. One of the special services which he has rendered in this connection is the help he has given in identifying spurious or "kept" consumer groups and agencies set up by special interests to capitalize, for private gain, on the increasing consumer consciousness in the community. If vocational representation in the administrative process becomes more formalized and extensive, the question of determining the representative character of consumer groups will be one of great importance.

In developing his consumer contacts, Mr. Montgomery has become known to consumer leaders from one end of the country to the other, and his time has been well occupied in the field and in the preparation of material of interest to consumers and consumer groups. Some of this material was prepared in co-operation with the Consumers' Project* staff, the remnants of which were transferred in July 1939 to the Consumers Counsel Office. The weekly radio broadcast through the courtesy of the General Federation of Women's Clubs has been continued. Research projects have been undertaken—such as a survey of weights and measures laws and their enforcement, and a survey of consumer education in colleges and secondary schools. Study programs have been prepared for consumer groups, and exhibits of consumer education materials. One of the most significant developments of the Consumers Counsel Office has been the bi-weekly *Consumers Guide*, with Mary Taylor as editor.

As was pointed out above, the *Guide* was started as part of the publicity technique developed by Howe against profiteering. At that time its main feature was the reporting of changes in farm prices in relation to changes in the retail cost of food, the first time that data of this sort had been gathered for release to the public in popular form. This was to be an aid to local groups in their activities against profiteering. Efforts were

* See above, pp. 86-88.

made from time to time to use the *Guide* as a vehicle for the presentation of the Consumers Counsel point of view on controversial issues within the A.A.A., but without much success, because of an effective censorship. However, the *Guide* gradually developed an interest in general consumer problems. A formal statement of purpose appeared in the issue of July 9, 1934:

The *Consumers' Guide* believes that consumption is the end and purpose of production. To that end the *Consumers' Guide* emphasizes the consumer's right to full and correct information on prices, quality of commodities, and on costs and efficiency of distribution. It aims to aid consumers in making wise and economical purchases by reporting changes in prices and costs of food and farm commodities. It relates these changes to developments in the agricultural and general programs of national recovery. It reports on cooperative efforts which are being made by individuals and groups of consumers to obtain the greatest possible value for their expenditures.

The producer of raw materials—the farmer—is dependent upon the consuming power of the people. Likewise the consumer depends upon the sustained producing power of agriculture. The common interests of consumers and of agriculture far outweigh diversity of interests.

While the *Consumers' Guide* makes public official data of the Departments of Agriculture, Labor and Commerce, the point of view expressed in its pages does not necessarily reflect official policy but is a presentation of governmental and non-governmental measures looking toward the advancement of consumers' interests.

The development of the *Guide* continued along these lines. The subjects of general consumer interest covered by it increased, though, as a publication of the Department of Agriculture, it was limited to the field of production, distribution and use of agricultural products. Also, as a government publication, it could not discuss matters under current Congressional consideration. But this still left a broad field open to it, which was explored in a leisurely, non-controversial style. By this

service, it had increased its circulation in June 1938 to the maximum allowed by the Bureau of the Budget, 135,000. A large part of this success was due undoubtedly to the fact that the *Guide* could no longer be looked upon merely as an organ of the A.A.A. It had largely become a service organ of the consumer movement, including of course farmers as consumers.

But the very success of the *Guide* as an organ of the consumer movement, spelt danger to it as a publication of the Department of Agriculture. Recently it has been decided that the subject matter of the *Guide* is to be confined to topics falling within the authorized activities of the Department of Agriculture, though, at the same time, the Bureau of the Budget authorized an increase of its free circulation to 150,000 per issue, and permitted the sale of subscriptions above that figure by the Government Printing Office.

This limitation of the public relations functions of the Consumers Counsel to subjects within the scope of the Department of Agriculture has again brought to the fore the long-discussed question of a permanent and independent consumer agency in the federal government.

CONCLUSION

THE history of the consumer agencies set up under the New Deal demonstrates that there is a specific consumer interest in the industrial process which can be clearly formulated with reference to particular issues. The advice that was offered by the Consumers Advisory Board, for instance, is impressive in its realism.

Further, the policy articulated by all the consumer agencies was of a broad constructive nature. It is helpful in this connection to recall the experience of the N.R.A. Advisory Council on which business and labor representatives, from wider viewpoints than those found in the code process for individual industries, tended on a majority of issues to approach the position taken by the C.A.B. advisers. Professor A. R. Burns has declared that the C.A.B. was the one branch of the N.R.A. interested in the broad social consequences of policy.¹ This quality in consumer advice has also been discussed by Dr. Leverett S. Lyon, formerly policy adviser to the N. R. Administrator: "From the Consumers' Advisory group the deputy obtained findings and recommendations based on a calculated attempt to reason out by economic analysis the possible implications of proposed code provisions, both in relation to the parties at interest under a single code and in relation to the economic and social structure as a whole. This advice was oriented on a wholly different plane from that furnished by other agencies. It disputed the merits of the bargaining approach and introduced external criteria of public welfare."²

The New Deal consumer agencies, it is true, had little influence on the course of events. But this was due not to the unreality of the consumer interest, nor its want of significance in promoting the general welfare, but to the lack of bargaining strength in the total consumer position. The main problem

¹ See A. R. Burns, *The Decline of Competition*, 1936, p. 576.

² See Leverett S. Lyon and others, *The National Recovery Administration*, 1935, p. 132.

that presents itself therefore is how to bring the consumer interest effectively to bear in the functioning of the national economy as a whole, and particularly in the process of formulation and administration of public policy towards industry (including agriculture). It is now widely recognized in democratic countries that if democracy is to function progressively, ways must be found for the effective expression of all legitimate interests in the community in the economic as well as in the political sphere. Indeed, in no area of public life is this more important than in the economic sphere which directly affects the material security and well-being of citizens.

It is clear from the experience of consumer agencies in the New Deal Administration that the consumer point of view will not receive adequate attention unless it is separately represented. It was General Johnson's thesis in N.R.A. days that "the consumer interest is the public interest and I represent the public." Where was the need therefore for separate representation? In reply to the general argument on these lines, the answer has been made³ that the public interest is a generalized interest covering all spheres of human activity—religious, political and social—while the consumer interest is specialized and limited, the interest of buyers rather than that of owners, or workers or sellers. It is in the public interest, therefore, in case of conflict between consumers, producers and other elements in the national economy, so the answer runs, to establish a balance among them in the interest of the whole. The same government official cannot therefore, according to this reasoning, properly represent both the whole and the part.

Perhaps more helpful in understanding the essential nature of the consumer interest is to emphasize that while the "public" is a generalized concept of all the emotions and activities of everyone, the "consumer" is "everyone" only while spending income, or in relation to the spending of income, and so is a more specialized concept than the concept of the "public."

³ See for instance, statement by Dr. Gardiner Means in the *Annals of the American Academy of Political and Social Science*, May, 1934, p. 14.

It is clear that in the regulatory process the general administrator can not properly represent the consumer point of view. In N.R.A., for instance, General Johnson's thesis if valid would have identified the consumer interest with the attempt by administrative officers to promote codes embodying the reconciled demands of employers and employees in particular industries. The records are a sufficient answer to that argument.

In the regulatory process there is an undoubted tendency for administrators to try to resolve conflicts as they are brought before them. They are almost bound to be influenced by arguments as they are presented, even if they are not responsive to pressure groups as such. The consumer interest, if it is not specially represented, is likely to be overlooked. In fact, in some cases no recognition is given to the existence of a consumer interest. The consumer, for instance, has no status before the Interstate Commerce Commission, except in the case of coal, when he can be represented through the Consumers Counsel. The briefs prepared by the Consumers Counsel with reference to freight rates for coal fixed by the Interstate Commerce Commission make it clear that the Commission has not been consumer-minded.

Further it is a matter of common knowledge that party politics have at times determined both the personnel and program of a regulatory agency—for instance the Federal Trade Commission. It is only realistic to recognize that the machinery of government, in Professor Clark's words, "is always exposed to being captured and perverted to the uses of class privilege."⁴

This brings us back to the question how to secure separate representation of the consumer interest in a program of social control for industry. The main difficulty is not so much in getting the concept of consumer representation accepted, as in applying it in practice, because the consumer mass is still so amorphous and ineffective in promoting its own interest. As a

⁴ J. M. Clark, *Social Control of Business*, 1939.

step in this direction the consumer agencies set up by the New Deal leaders, urged that a permanent consumer department be established in the federal government. This suggestion, whittled down under pressure of realism to one for a permanent consumer agency, has been consistently supported by unofficial consumer groups⁵ and by a number of economists and political scientists concerned with the problems of industrial regulation. Professor Herring, for instance, argues that "if the federal government is to aspire to a general responsibility for the country's welfare, it must find a place for the consumer viewpoint."⁶

The functions of such a service agency to consumers would be similar in many respects to the functions now being performed by the Departments of Agriculture, Commerce and Labor for farmers, business men and employees. They should include research and information on questions of consumer interest round which policy has to be determined. As was pointed out time and again by C.A.B. advisers, there is a vast ignorance about many questions of importance to consumers, including such specific questions as quality and use of consumer goods, prices, trade practices, consumer incomes, expenditures and budgets. Even when information is available it is often not available in a form which is most useful to consumers if they are to play an intelligent role in the market place or at the council table of industry and government. In its research the consumer agency would not duplicate work which is already being done elsewhere in the government, unless the orientation of this work is such that the results are not useful to an understanding of the consumer position.

⁵ See for example two concrete proposals for such an agency contained in 1. a memorandum presented to the President by a delegation of consumers, February, 1938, and printed in Hearings before the Temporary National Economic Committee, Seventy-sixth Congress, First Session, Part 8, May, 1939, p. 3473; and 2. a letter to the President by Dr. K. McHale, Director of the American Association of University Women, November 1, 1939.

⁶ E. Pendleton Herring, *Public Administration and the Public Interest*, 1936, p. 252.

Consumers not only need to have this material collected, but also presented in an intelligible form so that its significance to them can easily be understood. We are dealing here with inexperienced people confronted by vital economic issues. They also need to have disinterested advice on the probable outcome of policies or programs they might recommend for public or private action.

Another major function for the consumer agency should be the "representation" of the consumer interest on all appropriate occasions, as *e.g.* at public hearings before regulatory bodies and on interdepartmental committees such as the Committee for Reciprocity Information set up in connection with the trade agreement program. Representation is used here not in the sense of advocacy as when a lawyer pleads a client's case, but in the sense of an expert having at hand all relevant data and being in a position to interpret it from a consumer point of view. In view of the fact that consumers cannot rely on political strength to protect their interest it is of the utmost importance to them that all relevant facts should be known and clearly understood. There would therefore be a great opportunity for leadership in the position of director of the consumer agency and selection of an individual for the position should be made with that fact clearly in mind. It is a promotional role, calling for unquestioned competence, integrity of character, and faith in the value of the work to be done.

It is open to question how far government agencies should and can properly be looked upon as representative of special economic interest groups. There is no doubt however that over the years the Departments of Agriculture, Commerce and Labor have come to be thought of as promotional of the interests of the groups they serve. There are those who deplore this tendency towards functional representation within the Administration and who look forward to a time when the "pressure elements" will be taken out of the great public departments and set up in broadly based advisory committees. Such administrative purists naturally oppose any suggestion

to extend the representative function in the Administration by establishing a consumer agency responsible for presenting a consumer point of view. To them the consumer reply is simply that it is realistic to recognize that there is no immediate likelihood of a change in the present trend even if such a change were desirable and that meanwhile the consumer bargaining position is being relatively weakened by the help other economic groups are receiving from the government departments to which they are, in a very real sense, attached. The consumer movement is not in a position to sponsor a complete administrative reorganization on the basis of a new administrative philosophy.

A suggestion has been made that the "representative" or advisory function with reference to the consumer interest should be dispersed within the Administration rather than concentrated. The proposal is that a consumer adviser, or a consumer unit with advisory functions should be attached either to each department and commission concerned with economic problems, or to the administration of a particular act. The New Deal consumer agencies, for instance, were all set up, with or without specific statutory authority, in connection with the administration of particular acts. However, under these circumstances it has to be recognized that the agency cannot escape the philosophy and practical effects of the act on which it depends for existence. As Mr. John Carson pointed out on different occasions, his duty as Consumers Counsel under the National Bituminous Coal Act required him to appear in the consumer interest, but also as an officer appointed under the act it was his duty to facilitate its effective administration. Moreover, as an officer under the act he was committed not to disapprove of its major objective of price-fixing in the soft coal industry, though he must have been aware of the fact that the Consumers Advisory Board took a general position opposed to price-fixing except perhaps as incidental to a general industry-control program under effective public supervision.

The best plan for "dispensing" advice would probably be for each departmental chief concerned with economic policy to appoint to his staff a consumer adviser, whose duty it would be to acquaint himself with all facts relevant to the consumer position so that he would be able to advise his chief as to the probable effect of any proposed policy or action on the consumer interest. He would be expected to look to the director of the proposed central consumer agency as a source of information and would no doubt be influenced by the director's leadership in the consumer field. But his duty would be limited to "internal" advice, except as otherwise determined by his chief. He would take part in the informal departmental conferences so important in bringing about a meeting of minds within the Administration, and would have access to the departmental dockets and other information available to the staff of the department. He might appear at proceedings before regulatory units within his own department but the major responsibility for advising on the consumer interest in any part of the regulatory process affecting the economic system would be assumed by the director of the consumer agency.

A consumer adviser performing the intra-departmental functions outlined above would be relieved of the burden of divided responsibility which all the New Deal consumer agencies felt from time to time because of the dual role which vaguely seemed to be thrust upon them, involving responsibility to an administrative chief and an undefined responsibility to the consuming public. It was this sense of divided responsibility which led, for instance, to the conflicts over publicity. This is an impossible situation from the point of view of good administration unless regularized by specific statutory direction. But the result of statutory powers must be to formalize relations in such a way that they could be carried out at least as well by the director of the consumer agency. And it does not seem desirable that a "dispersed" advisory system, even if set up under statutory authority, should become a substitute for the formal advisory function of the consumer agency,

since the latter alone could be expected to develop an 'over-all' point of view. It is instructive in this connection to call attention to the urgency with which Mrs. Rumsey sought the establishment of a central agency free of the limitations imposed by association with a particular administration.

From a practical point of view there is much to be said for concentrating the formal consumer advisory function in a central agency. It would make possible a greater economy in trained personnel for research, informational and advisory work, and facilitate continuous and united effort by the best staff available. This is a matter of great importance, for the present at any rate, considering the difficulty of finding competent personnel with a consumer point of view. Another consideration in view of the fact that so much of the consumer field is unexplored, is the importance of preventing any fundamental difference of opinion arising as to what is in the consumer interest. Such a possibility must be taken into account not only because of the development of vested personal interests in different points of view, but because of the fact that unofficial consumer opinion is still largely inarticulate. On this latter point however there is no doubt that the success of a consumer agency in providing research, information and advice would in itself promote the development of consumer "awareness," and therefore consumer opinion on matters with which the agency would be called upon to deal. This has certainly been true of the economic groups serviced by the Departments of Agriculture, Commerce and Labor.

In addition to its service to consumers, the agency should be in a position to give advice to the President and Congress as to the consumer interest in any matter under consideration. In setting up a consumer agency the government would therefore be providing itself with a center of expert knowledge bearing on a significant aspect of economic policy. The importance to the President and other public officials as well as to members of Congress, of having experts within the Administration competent to advise on all economic interests affected

by government action can hardly be exaggerated if the general welfare is to be effectively promoted.

The next question to consider in connection with the proposed consumer agency is its status within the Administration. What type of agency would be most appropriate? The early proposals made during N.R.A. days were for a Consumer Department comparable in status if not in size with the Departments of Agriculture, Commerce and Labor. Since then it has been argued that consumers must be realistic in these matters, and, in view of the political weakness of their organization, concentrate their attention on getting an agency that would operate as a functional unit of an established Department. Much of the recent discussion on this subject has therefore revolved around the practical difficulty of finding a suitable administrative home for such a unit. This, it will be recalled, was also the question which confronted Mrs. Rumsey when she was endeavoring to organize a Consumers Division to service the County Consumers Councils.

Obviously the departments already orientated to a particular economic group are unsuitable as possibly limiting the effectiveness of the work of a consumer agency. The same criticism would apply to another proposal that has been made to set up an interdepartmental committee composed of the Secretaries of Agriculture, Commerce and Labor as an administrative host. Both the Department of Social Security and the Department of the Interior have been suggested as a more neutral setting though neither seems particularly appropriate. Another proposal has been to expand the functions of the Federal Trade Commission to include a consumer service unit. But the Federal Trade Commission is a quasi-legislative, quasi-judicial regulatory body independent of executive authority. Moreover, the function of the Commission is in effect limited to those areas of industry in which competition is still a reality, but the consumer interest is affected by the total economic process.

This difficulty of finding a suitable home for the consumer agency raises again the issue whether an independent unit

with independent appropriations and reporting directly to the President is not after all the only satisfactory solution of the problem. This would be out of line with the position taken by recent advocates of administrative reform who have urged an extension of the hierarchial system of administration heading up in a few major departments limited to a number within the "span of control" of the President. But an administrative theory under which adequate provision cannot be made for the performance of essential functions appears basically weak. Moreover, as Drs. Meriam and Schmeckebrier⁷ have suggested, the strict limitation of departments and independent establishments would be less important if the President had a well-organized, well-staffed co-ordinating agency, and if Congress were properly equipped with managerial services. The President cannot be protected from the vital issues affecting the public welfare by the administrative device of limiting the number of officials who have access to him. Perhaps the best solution, in the consumer interest, would be to set up an independent Consumers Administration and to recreate the office of Consumer Adviser to the President held by Mrs. Rumsey and Dr. Hamilton. However, the issue has to be faced that such an agency would be more exposed to attack by opposing economic interests than a unit set up in an established department, providing its host were sufficiently interested in its welfare to give it departmental protection.

There is a further question as to the relations of the proposed consumer agency both with existing bureaus in the Administration performing certain consumer services, and with consumers and organized consumer groups.

There are a number of bureaus engaged in various activities in the consumer interest—regulatory as in the Food and Drug Administration, research and educational as in the Bureau of Home Economics, statistical as in the Bureau of Labor Statistics. But none take into account, nor do they collectively take

⁷ L. Meriam and L. F. Schmeckebrier, *Reorganization of the National Government*, 1939.

into account the consumer's total position. The question whether these bureaus, or some or all of their functions, should be removed from their present location and concentrated in a central agency should be determined with a view to securing the best result in the consumer interest. For those units which are not transferred, or whose consumer functions are not transferred, it would be desirable that a coordinating committee should be set up comprising the immediate chiefs of these units under the chairmanship of the director of the consumer agency. This committee should be purely advisory and, by preference, informal. Its main purpose would be the more effective planning of the separate programs. This is particularly desirable in a field of interest that is relatively new or, perhaps one should say, newly rediscovered.

Much of the success of such an agency as that proposed would depend on the vitality of its relations with consumers and consumer groups. It is important that a Consumers Advisory Committee should be set up composed of representatives of the various bona fide elements in the consumer movement, and of experienced economists and purchasing agents sympathetic with the consumer point of view. The question might even be raised whether it would not be better to have the powers of the consumer agency vested directly in a representative board operating through an executive officer, as in the C.A.B. set-up, rather than vesting such responsibility in the director of the agency himself. The present administrative trend seems to be away from board responsibility, in the interests of administrative efficiency, but under present circumstances there is much to be said in favor of a board for the consumer agency providing proper financing could be arranged to ensure effective functioning by the board personnel. But if the plan for a responsible director with an advisory committee seems more feasible, then the committee should be given statutory recognition and the director should be required to consult with it. One of the factors leading to the disintegration of the Consumers Division, N.R.A. under Dr. Hamilton was

undoubtedly his failure to take advantage of his power to establish an effective advisory committee. Such a committee would also provide a bulwark for the agency against attack by special interest groups.

The experience that such committee work would give consumer leaders would be a great asset to the consumer movement. This is specially important since there is no doubt that the final responsibility for promoting the consumer interest must rest with organized consumers supported by a consumer-minded public. Even if the government takes the initiative in setting up a central consumer agency—that is to say acts on this matter without any considerable pressure having been brought to bear upon it—the agency will almost inevitably find itself hampered by the weakness of the total consumer position, particularly since there are powerful groups in the national economy who do not look with satisfaction upon organized consumer bargaining power. It is undoubtedly true, that, in the words of Drs. Meriam and Schmeckebrier,⁸ “the power of the bureaucrats arises from their relationships with voters and it is the power of the voters that really counts in the situation.” The growth and effectiveness of the work done by the proposed consumer agency would undoubtedly depend in the long run on the nature of the demand for it, though it would of course to a greater or less extent help create that demand.

It has been through organization that the producer interests have come to exert such a dominating influence over our public thinking. The consumer interest will have to be organized if we are to reorientate our thinking in terms of consumer needs. The future of the emerging consumer “movement” is therefore a matter of great economic and political importance.

The consumer movement today represents a wide range of consumer-mindedness.⁹ In this connection it is important to

⁸ *Ibid.*, p. 115.

⁹ See *Labeling the Consumer Movement* by Werner K. Gabler, prepared for the American Retail Federation 1939; also *Survey of the Consumer*

bear in mind that the consumer point of view can not be identified with a limited group of individuals. To be a consumer is a specialized function common to everyone throughout the total range of age, income, occupation. This is, in fact, a major difficulty in organization.

Until recently the consumer movement primarily represented middle-class attitudes. Groups of professional and club women concerned themselves with problems of "wise spending" at the retail counter, of "getting your money's worth," their slogan being "the consumer wants to know." Meanwhile there was a gradually expanding development of consumer cooperatives of the Rochdale type among middle-class groups in some urban centres and particularly among organized farmers in the Middle West.

During the last few years consumer awareness as the basis of organized activity has been extending to the wage-earners. To some extent this has been a by-product of "relief," those responsible for organizing and distributing relief having been confronted with the necessity of determining needs and how to satisfy them. "Wise buying" as a matter of dimes and pennies, has attracted the attention of many Settlement-House workers. Some groups in the organized labor movement, particularly the Women's Auxiliaries, have also been taking more interest in what housewives get for the wages they spend, and have been forming or joining cooperative associations. The labor movement on the whole, however, is still predominantly "wage" conscious.

Part of the increasing vitality of the consumer movement is due to the work of the consumer testing agencies, Consumers Research, Inc., and Consumers Union of the United States, Inc., the latter having been established by some former employees of Consumers Research, Inc., after a sharp conflict with

Movement, mimeographed statement prepared by Consumers National Federation, 1939; also a forthcoming book on *The Consumer Movement*, prepared by Helen Sorenson under the auspices of the Institute for Consumer Education, to be published by Harper & Bros.

that organization on labor policy. Consumers Union has been responsible for much of the growing interest in consumer questions among organized labor.

Finally there are a group of "intellectuals" who, though few of them have definitely associated themselves with consumer organizations, have helped to open up fields of inquiry and to stimulate thinking along consumer lines.

This brief résumé is perhaps sufficient to show that the basis of the consumer movement is to be found in a great variety of organizations, some of which have consumer problems as part of their total program, while others have been set up specifically to promote consumer objectives. The movement as it now exists represents all ranges of income from the leisured clubwoman to the impoverished "relief" mother. Under these circumstances it is easy to understand that the present cohesive quality of the movement is not very strong. Particularistic attitudes are still marked among various groups and sections. In an effort to create a greater sense of unity, and as a clearing house of research and information, a Consumers National Federation was set up in 1937, but has met with only limited success. But there are a number of indications of a growing sense of common objectives among the various organizations, much of which is no doubt due to the bitter attacks that have been made upon consumer activity by certain business groups, particularly in the advertising field.¹⁰ As illustrative of this trend towards conscious participation by the separate groups in a "movement," considerable significance is to be attached to a recent meeting of consumer leaders at which a set of common objectives was agreed upon. As summarized in a press release these are: ¹¹ 1. more useful information on labels, in advertising, and salesmanship; 2. more facts about the quality of goods, their prices and the conditions under which consumer

¹⁰ See statement by Helen Hall and Robert Lynd for the Consumers National Federation, December, 1939, in reply to an attack made in a report by an investigator for the Dies Committee.

¹¹ See *New York Times*, January 21, 1940.

goods are made; 3. representation of consumers at council tables of business and government where decisions are being made affecting the goods and services coming to market.

Further coordination of the consumer movement along these lines would lead to a clarification of opinion on consumer aims and policies. It would also help to protect consumer organization and the unorganized consumer from manipulation by special interests.¹² It would materially strengthen the consumer bargaining position.

What is perhaps of no less importance in strengthening that position is the widespread interest in consumer education that has developed in the schools and colleges. This is now finding a service centre, financed by the Sloan Foundation, in the Institute for Consumer Education, Stephens College, Mo. Such education should result in a greater consumer-mindedness among the general public and a more enlightened public opinion on consumer problems. This is of special importance in view of the fact that consumer activity is not generally regarded as news by the press unless it is under attack.

The main difficulty in consumer organization is lack of financing. Certain resources have been made available to the cooperatives, and other resources for consumer education as such, but otherwise the movement is not able to finance organizing ability on a scale in any way commensurate with the task to be performed. There is no source of savings for consumer protection in the meager pocket-books of the mass of consumers and those who have means do not find the problem pressing. Without adequate financing the consumer movement finds it difficult to provide the continuous leadership and trained personnel necessary to bring the consumer interest effectively to bear on public policy. One of the main difficulties with which the C.A.B. was confronted was that of securing suitable personnel for their advisory work. As Dr. Means has pointed out, since everyone is a consumer it has been assumed

¹² See T.N.E.C. Hearings, Part 8, 1939.

that any one can suitably represent the consumer interest. But clearly this is not so, and leadership is needed not only in the field of consumer organization but also in economic planning and program making.

Even more, such leadership is needed to bring to the forefront of public discussion a clear consumer objective in the confusion of our economic policies.

This objective can be simply stated in terms of securing for all people the material conditions necessary for physical well-being and human decency, at decreasing cost in energy and time. It is too extravagant in view of the widespread poverty of our times to talk in terms of "abundance." It may be, indeed, that in the future, having satisfied our basic material wants, we shall prefer leisure to abundance, under the urge of those spiritual needs which find political expression in the democratic way of life. In the meantime, however, the task is to direct our national policy towards the goal of a better standard of living for all.

The experience of the consumer agencies provides many illustrations of the need for such a change in policy. This is not only a question of new controls in industry. It affects also a vast range of legislation directed towards the support of special interests. Take, for instance, the agricultural marketing agreements, particularly the agreements for fluid milk, which aim at "maintaining" a "satisfactory" price for milk. As a result, a food which, it is generally agreed, is of basic importance to the health of the people, is kept beyond the reach of many of them. It would obviously be a wiser policy to keep the price of milk low and if necessary subsidize the dairy farmers directly, unless we are prepared to give it away to all who need it. Obviously in the public interest it is folly to pursue a policy which undermines the public health—a matter which no doubt will receive more attention with the development of the defense program.¹³

¹³ For a stimulating discussion of the importance of directing public policy towards cheapening the price of the necessities of life, see a report of the Economic Committee of the League of Nations, "Preliminary Investigation

The development of this program in itself makes all the more urgent the adequate presentation of the consumer point of view in the formulation and administration of public policy.¹⁴ Inevitably, as the program expands, our national economy will be dominated by the large-scale planning and organization which such major preparations for defense entail. A large part of our productive energy will be diverted to the making of implements of war, on a scale so vast and at such speed that it may engender that "emergency" point of view which loses sight of ultimate objectives—as happened, for instance, in N.R.A. to the detriment of the consumer interest. There will be little place anywhere in our national economy for the bargaining and balance of forces which Adam Smith believed to be an essential factor making for the public welfare. The question is whether, in this tragedy of waste, the consumer movement will be strong enough, or our public statesmen sufficiently farsighted, to provide the leadership necessary to pursue constantly that end towards which consumer policy is directed, not only for the people of this nation, but for all people—namely, that everyone shall be able to secure each day his daily "bread", of good quality, and at decreasing cost, under conditions promotive of human worth.

into Measures of a National or International Character for Raising the Standard of Living" by N. F. Hall, Director of the National Institute of Economic and Social Research, London, 1938.

¹⁴ It has been announced that the interest of consumers will be represented on the Advisory Commission to the National Defense Council by Miss Harriett W. Elliott, Dean of Women at the Woman's College of the University of North Carolina.

APPENDIX I

NATIONAL RECOVERY ADMINISTRATION

HOLD FOR RELEASE

MONDAY, JANUARY 7, 1935.

RELEASE NO. 9508

The National Industrial Recovery Board has received a memorandum from the Consumers' Advisory Board containing recommendations for the revision of the National Industrial Recovery Act. Although there has been no opportunity for formal consideration of these recommendations, which were submitted Saturday, January 5, the National Industrial Recovery Board immediately made them public in the belief that discussion of all such proposals is desirable.

The text of the memorandum is attached.

MEMORANDUM FROM C.A.B.

The Purpose of the Act Lost Sight of

When the National Industrial Recovery Act was passed in 1933 Congress included in its statement of policy its purposes "to promote the fullest possible utilization of the present productive capacity of industries, to avoid undue restriction of production . . . to increase the consumption of industrial and agricultural products . . . and to conserve natural resources." With these purposes the Consumers' Advisory Board is in complete accord. The Board believes that such policies should have dominated the administration of the Act and should be made effective in the revision which the new Congress is now compelled to undertake. If the Recovery Act, in its practical application, has unduly restricted production, prevented the fullest possible utilization of productive capacity or failed to increase consumption, it is because the pressure of special interests for individual advantage has diverted the course of the Act from that which Congress intended it to follow.

More Than An Emergency

The problem before the Congress is no simple one. It involves not only the adoption of those policies best calculated to promote industrial activity and employment but also the determination of

methods to be employed in meeting the more persistent issue of industrial regulation. It presents for solution problems of the extractive industries, manufacturing, distribution and the service trades. It raises the whole question of enforced competition as opposed to controlled monopoly.

Every Producer A Consumer

Every citizen has an interest in these issues both as a producer and as a consumer. His interest as a producer is a particular interest which may often come into conflict with the interests of others. His interest as a consumer is a more general interest which all citizens have in common. It is from the point of view of this general interest that the Consumers' Advisory Board offers its observations upon the forthcoming revision of the Act.

The Consumer Interest

The consumer's interest requires that goods be turned out in large and increasing volume, that living standards may be advanced to the highest level to which our productive capacity and our technical skill can raise them. Competition which contributes to this end must be encouraged, prices kept low. There must be maintained in the industrial system a degree of flexibility which will permit the low-cost to displace the high-cost plant, the more efficient producer to supersede his less efficient competitor. The door must be kept open to new products and processes, to new blood and new ideas.

Should We Put on the Brakes?

The evidence is conclusive that the people of the United States do not have and never have had an average standard of living high enough to justify complacent acquiescence in any program which restricts production. Thousands are improperly fed, badly housed, inadequately clothed. Nearly all of us could increase our consumption of goods and service without overindulgence. In such a situation it is fantastic to talk of overproduction. There has been overcapacity only in the sense that industry has produced more than it can sell at high prices. If prices are not so high as to prevent it, idle labor and capacity will be put to work and the so-called surpluses of the goods of which our people stand in desperate need will shortly disappear.

A Floor for Competition

The consumer wants a low price, but he does not want such a price if it is to be obtained only by depressing labor standards, by impairing the quality of goods, by practicing misrepresentation or by squandering precious natural resources. He does, however, want the lowest price which is consistent with conservation, with honest merchandizing, with proper quality and with decent wages, hours and working conditions. His interest is to be served neither by unbridled competition nor by unbridled monopoly. Competition forces prices down, but it may do so at the expense of the worker, the consumer, the fair competitor, and the coming generation. There is no indication that monopoly deals more decently with labor, gives high quality, eliminates deceptive competitive methods or conserves resources; it does however enjoy the power to establish prices which will reduce the volume of industrial output and impair the standard of living. What is needed is an intermediate program which might at once put a floor under labor, consumer and trade standards and preserve the protection against undue price increases which competition affords above that floor. Adoption by industry of codes of fair competition confined to the establishment of minimum conditions of employment, quality guarantees and competitive standards might have provided such a program. That the present codes have gone far beyond these simple minima is a matter of common knowledge.

The Codes Distorting the Act

Some groups have employed the codes, frequently in violation of the purpose of the Act and even in defiance of their plain terms, as a means of eliminating active price competition, increasing and protecting profit margins. Prohibitions against sales below "cost" with industry itself determining "cost", basing point price systems, minimum mark-ups, maximum trade-ins, resale price maintenance, limitations on discounts and guarantees, minimum prices—such restrictive code provisions have little to do with the establishment of basic standards for labor, quality standards for the consumer or simple honesty for the trade. They may be used, directly or indirectly, to control prices and profits. They aim not to regulate competition but to eliminate it. Insofar as they boost prices they operate to reduce output and impair living standards.

They are anti-consumer both in intent and effect. Such powers can not safely be entrusted to private agencies unless accompanied by effective public supervision.

Industry Puts On A Strait-Jacket

Certain industries have seized upon the codes as an opportunity to protect established concerns against the growth of rival producers. They have set up standard differentials in the discounts granted to different types of distributors, imposed standard methods of cost accounting, limited machine hours, endeavored to allocate production and to check the introduction of new equipment. The inevitable tendency of such provisions is to destroy that flexibility which is so essential to the success of small enterprises and to the growth of economic efficiency. When he adopts them, the business man deliberately places himself in a strait-jacket from which the community will soon be called upon to extricate him.

Can We Prevent Destructive Price Cutting?

It may well be questioned whether the government should undertake to outlaw "destructive price cutting." In practice it is next to impossible to identify the destructive price cutter. In general the designation is applied to any business man who undersells his competitors. If he undersells by exploiting his workers or misrepresenting his products his price cutting may fairly be called destructive. But if he undersells by virtue of his superior efficiency there is nothing socially destructive in his policy. The practical difficulty comes when we attempt to discriminate between price cutting which is and that which is not socially justified. Any device which can be employed to check destructive underselling—resale price maintenance, minimum price fixing, prohibitions against selling below cost—can also be used to eliminate legitimate price competition. Any ban on destructive price cutting lets the camel's nose in under the tent.

Open Price Systems

The Open Price reporting systems which are permitted under many of the codes carry possibilities both of use and of abuse. In some industries price reporting may be used to increase the general availability of price information and to stimulate genuine

price competition. Elsewhere it may be employed to fix collusive prices and to compel individual business concerns to adhere to them. Any permission granted industry to make use of open price reporting should therefore be surrounded with such safeguards to guarantee against its abuse as have already been suggested by the Consumers' Advisory Board.

Profits Without Risks?

The effort has been to stabilize profits. But profits cannot be stabilized under a system of industrial freedom. Freedom involves risks. Profits are the incentive, losses the hazards of those who assume risks. When risks are eliminated the economic function of profits disappears. The authors of many of the codes apparently were determined both to have their profit cake and to eat it. In attempting to guarantee themselves a profit margin they have tried to shift to other groups in the community those risks which it was their own function to assume. The effort to stabilize profits comes perilously near to stabilizing poverty.

A Shot-Gun Attack

No common formula can be applied to the control of several hundred separate industries and trades which differ one from another in their essential economic characteristics. Some are composed of several thousand small, scattered units; others are dominated by a handful of powerful concerns. In some it is next to impossible to subject the individual producer to any common control; in others it is fanciful to expect him to exhibit any real independence. Some employ a few hundred, others hundreds of thousands of workers. Some produce necessities, others non-essentials. In some, competition may be counted upon to eliminate waste; in others it inevitably begets it. Yet each finds itself functioning under a Code Authority which is administering the labor clauses, the fair practice provisions, the price and quantity controls of a code of fair competition. It should be apparent by now that the complexity of the industrial system demands a more discriminating approach.

Conserving Resources or Conserving Profits?

Natural resources industries such as lumbering, bituminous coal mining and petroleum extraction, differ from other code-controlled

industries in that they alone present the problem of conservation. The active competition which elsewhere serves the consumer's interest here occasions flagrant waste. It is unthinkable, therefore, that they should again be subjected to the anti-trust laws. But code control is not the only alternative. The codes are concerned not with ultimate shortages but with temporary surpluses. They are directed not toward the conservation of resources but toward the conservation of profits. In no case do they cope with the basic difficulties of the extractive industries. These industries require controls specifically designed to meet their peculiar needs. The very measures by which resources are conserved often place a check on one group of profit-seekers and augment the receipts of others. Equity, therefore, demands that any set of output restrictions be accompanied by a tax which will appropriate for public uses the increase in income attributable to the controls which the government has applied. The consumer may fairly be asked to pay more for oil in order to conserve its supply but he may reasonably object to a policy whereby the government compels him to contribute to the creation of private fortunes. The natural resource industries are too vitally affected with a public interest to be turned over to what is called "self government in industry." They must be regulated by public agencies for the common welfare.

Where the Anti-Trust Laws Fail

In other industries, not a few in number, monopolistic control is notoriously present. Competition had passed away long before the enactment of N.I.R.A. It could not conceivably be resurrected by the re-application of the anti-trust laws. Here these laws are impotent. But we are not ready to go to the other extreme of applying public utility regulation, controlling securities, accounts and services, determining valuations and setting rates. We are confronted, therefore, with the necessity of applying some other type of control. We believe that it would be wise to experiment further with control by codes in this field. Such codes should outlaw monopolistic price practices, but they should be administered by authorities whose membership largely represents the public interest. They should require regular collection, reporting and publication of statistics on costs, prices and profits. It may be

necessary to supplement such supervision and publicity by revoking the monopolist's patents, removing the tariffs which protect his market, taxing his profits, forcing him to face public competition or applying other controls which go beyond the scope of the Recovery Act. The Federal Trade Commission has recently made to the Congress a number of recommendations which should be seriously considered in this connection. The code of fair competition is one of many weapons in the arsenal of public control. It deserves a further trial.

Overdoing the Codes

In the vast majority of industries, which present neither the problem of conservation nor that of *de facto* monopoly, the codes might serve three important purposes. They might create quality standards for the protection of the consumer. They might set up minimum wage and hour standards for the protection of labor. They might establish trade practice rules for the protection of the business man against his less scrupulous competitor. Each of these purposes might be better served than it is through the present code mechanism. The amount of quality protection which the codes have given the consumer is negligible. It is unlikely that quality standards will ever emerge from a codification process in which the initiative resides primarily in industry. The standards which are needed by industry itself in order fairly to fix the quality level of price competition are unlikely to appear until they are developed and promulgated by some consumers' standards agency established by the Federal Government. Minimum standards for labor, if they cannot be established by statute, may be written into codes. But it should not be necessary to set up extensive and costly private machinery for their enforcement. It is already recognized that the enforcement of labor provisions cannot be left to industry alone. Public factory inspection and public prosecution of labor code violators is the answer. Trade practice rules, finally, if confined to matters which have already been legally established as unfair, may be enforced through the Federal Trade Commission and the courts. There is a necessity, however, for a simplification of procedure to expedite the handling of these complaints.

Simplifying the Codes

It seems desirable in any future continuation of the N.R.A. to confine the great majority of the codes to a few simple provisions covering clearly established unfair trade practices, incorporating publicly approved consumer standards, prohibiting child labor, setting maximum hours and minimum wages and providing for the right of collective bargaining. The government, if it is to prevent competitive impairment of labor standards, must retain the right to impose such codes and must itself provide for the enforcement of their labor provisions.

Business Rights or Privileges?

Under exceptional circumstances it may appear to be wise to carry a code beyond simple labor, quality and fair practice minima. Business may make out a case for the establishment of standard cost accounting systems, open-price reporting, the collection and sharing of statistical information, the adoption of standard contract forms, the limitation of discounts, premiums and guarantees, the prohibition of loss-leaders or even for the temporary imposition of output and capacity controls. Each of these devices substitutes central control for active competition. Each may be used to establish something other than a competitive price. Each achieves legal status only by public consent. None can be made completely effective without public support. If anything is granted to any business in a code, therefore, beyond the simplest labor, quality, and trade practice minima, it must be granted not as a right but as a privilege.

Balancing Power with Control

Each such extension of privilege should be conditioned upon a proportionate extension of protective control. Government cannot safely turn over to private agencies public privileges which are subject to serious abuse. It follows that public membership on code authorities should increase as the powers of these agencies are increased. This is a principle which has already been recognized in the petroleum code. The precedent should be followed in the establishment of other authorities. A single administration member might suffice on a code authority which deals only with labor, quality and fair practice minima. Any agency, on the other hand, which administers the output, price and profit controls which must

be present in the government of the natural resource industries must be predominantly public. Between these extremes, public control must balance grants of power. Public representation on the authorities administering the codes of those industries where high concentration assures market dominance should at least equal that of industry itself. We are not prepared to recommend a simple common formula for the designation of labor or consumer members on each of these bodies. It may be well for a time to experiment with different methods of representing these interests, both direct and indirect. Our only insistence is that they must be represented.

The Tariff

The section of the Act which provides for possible increases in customs duties has not been employed to raise trade barriers. It nevertheless carries, as long as it remains in the law, a constant threat to our trade with other nations. Insofar as it may be used to reduce the importation of such raw materials as lumber and petroleum it conflicts with the announced policy of conserving natural resources. Insofar as it may be used to increase rates on goods which are produced under monopolistic conditions in the United States, it robs the government of one of the most effective weapons which it can use to attack monopoly. Its very presence on the statute books cannot fail to embarrass the administration in its present efforts to negotiate reciprocal tariff pacts and to find foreign markets for our agricultural products. This section should be dropped from the Act.

Turning on the Light

Clearly included in any legislative reconstruction of N.R.A. should be detailed provision for the collection, analysis, interpretation and publication of industrial and trade statistics. A federal agency should be designated to prescribe the subject matter of reports, their form and the time of their collection. It should be further empowered to place a member of its staff in every code authority office to procure compliance with the reporting provisions of the law. Such representation might well be financed by levying a specific fee against the code authority for the government's statistical service. Information thus collected should be made available in summary form, without identification of individual reporters, to the industry and to the general public. It

might be extended to cover orders, materials on hand, goods in process, stocks on hand, sales, prices, employment, wages, hours, payrolls, equipment, contracts, costs and profits. The opportunity is now open to obtain the information upon which both business policy and public policy should be based in the years to come. It should not be passed by.

What Needs to be Done

We recommend, in conclusion:

- (1) That the government retain the right to impose codes of fair competition as a measure of industrial control;
- (2) That the vast majority of these codes be confined to the establishment of simple minimum standards governing hours, wages, child labor, collective bargaining and fair trade practices;
- (3) That there be added to these standards comparable quality standards for the protection of the consumers;
- (4) That definite limits be set on such price and quantity controls as may be permitted to code authorities in exceptional cases;
- (5) That public membership on code authorities be made proportionate to the powers which they exercise;
- (6) That the tariff section of the Act be repealed; and
- (7) That provision be made for the collection of complete industrial statistics.

Whether the policy embodied in these recommendations should be written explicitly into the law is for Congress itself to decide. In the main, it might be carried out in the administration of the Act without specifically amending its terms. These proposals do not constitute a complete program of public control. They are presented, rather, as minimum requirements which should be met even if Congress confined itself to a brief emergency extension of the Act. Continuance of the Recovery Act as an emergency measure, however, will merely postpone issues which must sooner or later be faced. Social control of lumber, petroleum, bituminous coal, public regulation of those industries in which high concentration has destroyed market freedom, establishment of consumer quality standards, establishment and protection of minimum standards for labor, in short the socialization of monopoly and the civilization of competition—these are human objectives which cannot long be delayed.

APPENDIX II

FOR RELEASE JUNE 10, 1935.

STATEMENT BY THE CONSUMERS' ADVISORY BOARD

The Consumer must be represented. In this period of readjustment of the N.R.A., this fact stands out. Any form of industrial control becomes ill-balanced unless every economic interest concerned is represented. An essential economic interest is that of the consumer.

The experience of the Consumers' Advisory Board illustrates both the need for consumer representation and the type of work that must be done if consumer representation is to be effective in the future. Under N.R.A., business groups from various industries presented demands for: Price protection and restriction of output to safeguard their interests; administrative authority which, as interested parties, they could not use with fairness to all; trade practice rules, many of which were so rigid and detailed they could not be administered or enforced.

Because of the lack of consumer organization, almost the only opportunity for presentation of the consumers' viewpoint in regard to these demands was through the Consumers' Advisory Board. Some of the proposals which would have been most harmful to the consumer were rejected on the advice of this Board.

But the Board could not gain as great recognition for the interests of consumers as the other advisory boards secured for the interests of the groups that they represented. Its effectiveness suffered because of the lack of an organized constituency and because of lack of the support of a permanent Government agency. Behind the Labor Advisory Board was a Department of Labor. Behind the Industrial Advisory Board was a Department of Commerce. Behind the Consumers' Advisory Board lay only a few scattered Government agencies largely responsible to these other Departments.

Abuses which impaired N.R.A.'s effectiveness and diminished its public support might have been avoided if consumer interests had received more weight. The lesson of the N.R.A. should be applied to the agencies which are to continue the regulation of industry. Pending legislation would establish Government control

of the oil and coal industries. The consumer interest should be given full equality in the exercise of this control.

In short, the consumer must be represented in the future on all separate boards whose decisions affect the price or the quantity or the quality of the goods produced.

To coordinate the work of these representatives, to make it effective, and to maintain a sustained governmental interest on behalf of the consumer, some permanent independent and responsible consumers' agency must be created.

Such an agency might take the form of a Department of the Consumer or of a Consumers' Commission. This agency would tie together the work of separate Government bureaus affecting the consumer and would act as spokesman between the consumer and the Government. It would collect and distribute information of value to the consumer. It would promote the establishment of standards, grades and labelling for consumers' goods.

A beginning in this direction has already been made in the Consumers' Division of the National Emergency Council.

We believe that only as the importance of consumer representation is recognized, will modern industry attain its maximum effectiveness in the filling of human needs.

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